Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

DR. GEORGE R. HARKER -- PETITIONER

VS.

UNIVERSITY PROFESSIONALS OF ILLINOIS, ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD, MARK T. DUNN, et al.,--RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DR. GEORGE R. HARKER
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83pp

QUESTIONS PRESENTED

(a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. (no other information on this page)

Does the deprivation of due process (Fourteenth Amendment) utilizing the termination procedure promulgated by Western Illinois University and the University Professionals of Illinois and overseen by the Illinois Educational Labor Relations Board constitute the "deprivation, under color of any State law, statute, ordinance, regulating custom or usage" referred to in 42 § 1983 and is it actionable under § 1343.(a)(3)?

Does the deprivation of freedom of speech (First Amendment) utilizing the termination procedure promulgated by Western Illinois University and the University Professionals of Illinois and overseen by the Illinois Educational Labor Relations Board constitute the "deprivation, under color of any State law, statute, ordinance, regulating custom or usage" referred to in 42 § 1983 and is it actionable under § 1343.(a)(3)?

Does conspiring and interfering with the court appearances of a university professor in support of women's rights constitute a violation of 42 § 1985 and thus be actionable under § 1343.(a)(1)?

LIST OF PARTIES

(b) A list of all parties to the proceeding in the court whose judgement is sought to be reviewed

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Western Illinois University, Illinois Educational Labor Relations Board, Bernard DiGrino, John Maguire, Eric Stiffler, Gordon Kirk, Ralph Wagoner, Donald Spencer, Burton Witthuhn, Charles Spencer, Thomas Layzell, and Michael Provines are represented by Edmund C. Baird, Asst. Illinois Attorney General, 100 W. Randolph Street 12th Floor, Chicago, IL 60601, 312-814-2093 direct phone, 312-814-3312 firm phone

University Professionals of Illinois, Maurine Magliocco, Mitchell Vogel, Richard Brewer, Barbara Hillman, Gilbert Belles, and Robert Holton are represented by Barbara Hillman, Attorney at Law, 343 S. Dearborn, 13th Floor, Chicago, IL 60604-3805
312-922-2800

Mark Dunn is represented by R. Michael Henderson, Attorney at Law, 227 N.E. Jefferson Street, Peoria, Illinois 61602
309-674-6503

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(c) if the petition exceeds five pages, a table of contents.

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Gorenc v. Salt River Project Agr. Imp. and Power Dist., C.A.9 (Ariz.) 1989, 869 F.2d 503, certiorari denied 110 S. Ct. 256, 493 U.S. 899, 107 L.Ed.2nd 205 17

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AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub.L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284.)

Conspiracy to Interfere with Civil Rights

42 § 1985. Conspiracy to interfere with civil rights.

"(2) Obstructing justice; intimidating party, witness, or juror

"If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any

court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified.... or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws."

42 § 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13,24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect, but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment of the party found guilty.

§ 1343. Civil rights and elective franchise

(a)The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States, or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(As amended Sept. 3, 1954, c. 1263,§ 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637; Dec. 29, 1979, Pub. L. 96-170, § 2, 93 Stat.1284.)

IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

(d) citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies.

For cases from federal courts:

The opinion of the United States Court of Appeals for the Seventh Circuit case No. 98-1318 which was decided on January 21, 1999. It appears at Appendix A to the petition and is unpublished.

The opinion of the United States District court appears at Appendix B to the petition and is unpublished.

Recommended Order and Decision of the Illinois Educational Labor Relations Board's Executive Director dated January 8, 1996 and published at 12 PERI ¶ 1012

Opinion and Order of the IELRB dated September 11, 1996 and published at 12 PERI ¶ 1080

JURISDICTION

(e) A concise statement of the basis for jurisdiction in this Court, showing:

(i) date of the judgement or order

The date on which the United States Court of Appeals for the Seventh Circuit decided case No. 98-1318 was January 21, 1999.

No petition for rehearing was timely filed in this case.

(iv) statutory provision believed to confer on this court jurisdiction to review

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(f) the constitutional provisions, ... set out verbatim with appropriate citation.

This action is brought pursuant to 42 U.S.C. §1983, §1985, §1988 and the First and Fourteenth Amendments of the United States Constitution Jurisdiction is founded upon 28 U.S.C. § 1331 and §1343 (1)(2)(3)(4), and the aforementioned statutory and constitutional provisions.

AMENDMENT 14

Section 1. Citizens of the United States.

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punishment of the party found guilty.

§ 1343. Civil rights and elective franchise

(a)The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

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(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States, or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(As amended Sept. 3, 1954, c. 1263,§ 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637; Dec. 29, 1979, Pub. L. 96-170, § 2, 93 Stat.1284.)

STATEMENT OF THE CASE

(g) a concise statement of the case setting out the facts material to consideration of the questions presented and also containing the following: (see ii below)

Circumstances surrounding the firing of Dr. George R. Harker from his 21 year tenured university position in 1991 are the basis for this matter.

Dr. Harker alleges that at least 17 individuals were involved in a conspiracy to deprive him of his civil rights, i.e. his right to pursue a particular area of research, his right to teach college level courses in the manner he saw fit, and ultimately his right to be a tenured professor at Western Illinois University.

The method to discharge a professor from the university is defined by the contract between the university and the union. It is a process which ultimately deprived Harker of his fourteenth amendment right to due process.

Dr. Harker was taken through the procedure defined by the contract and charged with eleven charges. The President would assert that ten of the eleven charges were found and therefore recommended Dr. Harker's termination to the Board of Governors of State Colleges and Universities.

The nature of the process is such that the union has essentially control of all of Harker's rights. It would appear that a process existed for the union and the university to process Harker's termination within a system of procedures and reviews to provide for due process. However, that was not the case.

The Illinois Education Labor Relations Board is empowered by the State of Illinois to monitor and resolved disputes between the union and the university with regard to compliance with the contract.

The union and university would involve Harker in that process with grievance hearings and eventually taking the matter to arbitration in 1995. (Some four years after the termination.)

Harker came to believe that he was not receiving due process from the union and the university and turned to the IELRB to seek assistance in obtaining this basic right. However, ultimately Harker

would learn that the IELRB essentially endorses whatever the university and union agree to and has no interest in the rights of the individual.

At this point Harker realized that he could not get just treatment from the procedures that were available to him. Harker then undertook to study federal law. He found within the first and fourteen amendment and the civil rights provisions of 42§1983 what he believed to be a course of action.

A course of action that could only be undertaken in a federal court. The year was 1995 when plaintiff Harker understood the nature of his rights under the constitution. This should be the time when the clock starts regarding any application of the statute of limitations. "While time limitation in a civil rights unit is borrowed from state law, the federal rule fixes the time of accrual that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action. *Bireline v. Seagondollar*, C.A.4(N.C.) 1977, 567 F.2d 260, certiorari denied 100 S.Ct.83, 444 U.S. 842, 62 L.Ed.2d 54."

Financially ruined by his termination and the union's failure to provide any financial assistance, he proceeded to implement his action *pro se*. In his first effort he learned that the court was not inclined to assist the *pro se* in any meaningful way. Nevertheless, in the process of working through the procedures and becoming more familiar with the system he was able to discern the nature of the perceived problems with his first attempt to articulate his position.

Recognizing the numerous problem inherent in his first effort he withdrew the case and prepared another pleading which he felt did a better job of articulating the basis for his case.

Harker realized early on that he was not suing the state but rather the individuals that conspired with one another to utilize the color of law as a means of depriving him of his constitutionally provided right of due process. Harker also realized that the nature of the procedure as promulgated by the university and the union and endorsed by the IELRB basically did away with Harker's fourteen amendment rights of due process.

Harker realized that he needed to seek the federal court to recognize this and require a change in the structure of the state law.

Clearly the IELRB was not performing the functions that one would associate with such an agency. It appeared from Harker's studies of the federal law that the correct procedure was to seek an injunction against the various state entities to this end.

In his deeper understanding of the provisions of 42 § 1985. Harker realized that he could document how various individuals had conspired to undermine and ultimately force him from the university. Harker's activity in the area of being an expert on public nudity brought him to the attention of segments of the women's movement. Harker knowledge on this issue resulted in the overturn of convictions for some nine women in a New York proceeding.

There has always been a long history of animus toward women in the Department of Recreation and Park Administration at WIU. It became clear that this also was part of the basis for the firing. This was also brought out in the initial pleading.

In the period of 1991 through 1993 (and beyond) Harker believed that the procedures outlined in the contract (if properly followed) would result in his termination being reversed. Harker believes that this very issue of the timeliness of his actions is a matter that must be carefully scrutinized by the court with regard to each individual and in the context of the total situation. Why were various grievance hearings and an arbitration hearing still continuing involving the union and the university in 1995 if the matter had been closed in 1993?

Plaintiff Harker believed that a mechanism existed within the provisions of the contractual arrangement between the university and the union to deal with the perceived problems of due process. He also thought that state administrative remedies were available through the Illinois Educational Labor Relations Board. Only after receiving the final decision of the IELRB in September of 1996 could it be determined that the alleged violations of Harker's civil rights would go unchallenged. It seems clear from case law that such administrative remedies must be completed before going into Federal Court.This makes sense, a legitimate review process could have occurred and the decision reversed. However, the nature of the process is such that no such action would or could be taken to correct the situation. The

IELRB'S role appears to be that of legitimizing the actions of the union and the university and has nothing to do with the rights of the individual.

Plaintiff pursued the administrative remedies that were available to him, i.e. processing various complaints with the union and the IELRB. The latest complaint filed in 1995 with a decision rendered in January of 1996. This was appealed and a decision was rendered in September of 1996, although a copy of this decision was never presented to the Plaintiff. (Plaintiff only learned of the decision and the nature of its contents when it was presented to the court by the lawyer representing the university.)

Case law suggest that one must pursue administrative remedies if available. "Plaintiff with a claim for relief under this section is not required to exhaust state judicial remedies but must exhaust state administrative remedies. *James v. Board of Ed. of Central Dist. No. 1 of Towns of Addison et al.*, C.A. 2 (N.Y.) 1972, 461 F.2d 566 certiorari denied 93 S. Ct.529, 409 U.S. 1042, 34 L.Ed.2d 491 rehearing denied 93 S.Ct. 1355, 410 U.S. 947, 35 L.Ed.2d 617, on remand 385 F.Supp.209." This case law suggest that it would have been inappropriate for plaintiff Harker to file earlier.

"Where constitutional claims are brought under this section, there is a general requirement of exhaustion of administrative remedies. *Kinzli v. City of Santa Cruz*, D.C.Cal 1982. 539 F. Supp. 887."

It would seem that the cases cited above would clearly establish plaintiff's Harker's right to a hearing in federal court. Both the district and the appellate court erred in not considering the information provide above for case law supports the notion that the facts must be viewed in a light most favorable to the *pro se* plaintiff. "Note 44. Pro se complaints Pro se complaints must be held to a less stringent standard than formal pleadings drafted by attorneys. *Bach v. Scott*, D.C.Ill. 1973, 357 F. Supp. 1125."

The appellate court spent a lot of time developing and documenting the idea that the IELRB is the state. Indeed it is. Harker is not and was not intending to sue the state but rather the

individuals that conspired to use the "color of law" manifest by the regulations of the IELRB and the university with the cooperation of the union.

One question was whether the union was a state actor. Case law clearly suggest that under the circumstances described here that it is. If one has an action under § 1983 then for purposes of the act the union and private individuals can be considered state actors. "Whether certain conduct is "under color of state law" or "state action," for purposes of § 1983 and Fourteenth amendment, is a question of federal, not state law. *Gorenc v. Salt River Project Agr. Imp. and Power Dist.*, C.A.9 (Ariz.) 1989, 869 F.2d 503, certiorari denied 110 S. Ct. 256, 493 U.S. 899, 107 L.Ed.2nd 205."

"State's determination that an association is a private association for purposes of state law does not limit federal courts in determining whether association has acted under color of state law and violated U.S.C.A. Const. Amend. 14. *Robinson v. Wichita Falls & North Texas Community Action Corp.*, C.A. 5 (Tex.) 1975, 507 F.2d 245."

These defendants are state actors by virtue of their symbiotic relationship with the university. "U.S. Code 42 § 1983 note 574 Symbiotic relationship with state-Generally".

"Private action is transformed into "state action" for purposes of § 1983 under symbiotic relationship test when state has so far insinuated itself into position of interdependence with private party that it must be recognized as joint participant in challenged activity; in sum, symbiotic relationship test seeks to establish whether overall interest of government and private actor overlapped to such extent as to virtually coincide. *Chan v. City of New York*, S.D.N.Y. 1992 803 F. Supp. 710, affirmed 1 F.3d 96, certiorari denied 114 S.Ct. 472, 126 L.Ed.2d 423."

In closing there is a lot of information and case law to support the civil rights action alleged by plaintiff Harker. "Courts should endeavor to construe pro se complaints for protection of civil rights with utmost liberality and without regard to technicalities, but rules do not require an unreasonable construction or gross assumptions *Mahurin v. Moss*. D.C. Mo1970, 313 F. Supp. 1263." No unreasonable

constructions or gross assumptions are required given the nature of the material presented in this case. (An abridged version of the initial pleading is presented as Appendix D of this document.)

ii)if review of a judgement of a US court of appeals is sought the basis for federal jurisdiction in the court of first instance.

Jurisdiction original suit reference:

§ 1343. Civil rights and elective franchise

(a)The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States, or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(As amended Sept. 3, 1954, c. 1263,§ 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637; Dec. 29, 1979, Pub. L. 96-170, § 2, 93 Stat.1284.)

REASONS FOR GRANTING THE WRIT

(h) a direct and concise argument amplifying the reasons relied on for allowance of the writ

Dr. Harker was a competent tenured professional educator who did an outstanding job at Western Illinois University for twenty-one years. It is clear that his firing was based on jealousy rather than an "adequate cause" provision of the university contract. One would think that the provision of the state education system would be able to sort through and correct the injustices of the situation. However, this was not to be the case.

On pursuing the recourse seemingly available to him regarding his firing he found that the system did not work and could not work to provide justice. Being a United States citizen Dr. Harker believed that the constitution provided some basic rights. He presumed he was entitle to those rights and that he could access those rights through the judicial system. To this point he has found that any concept of protection under the constitution for the common man seems to be as fleeting and as far off as a mirage in the desert.

The materials cited above can lead to only one conclusion. Plaintiff Harker has outlined a cause of action involving the deprivation, under color of state law, of rights secured by the constitution and laws of the United States. Case law clearly demonstrates that he has met the criteria necessary for this matter to be heard in the District Court. Indeed the nature of his allegations are such that there is no other forum where it can or should be heard.

The issues are so deeply entwined with the concept of academic freedom and the public good that to preclude a hearing on this matter would deeply and profoundly impact the fundamental premises of higher education. The idea that individuals must open their minds to new and different ideas without fear of retribution. It is the job of educators and education to facilitate that dialogue.

Failure of the court to review this case will bode ill for every conscientious tenured professor in Illinois (indeed in the United States). The constitutionally provided right of free speech and due

process has been totally and successfully undermined by the actions of the people and agencies charged in this action.

Plaintiff Harker fully recognizes that a review on a writ of certiorari is not a matter of right, but of judicial discretion. However the first amendment asserts that citizens do have a right to "petition the Government for a redress of grievances."

In filing his action Dr. Harker was asserting that right to seek redress of what he perceived as a very legitimate grievance. He went to considerable expense and effort to properly pursue that action within the federal court. Clearly the proper venue for such an action.

The contempt and disdain manifest in the district courts order combined with the threat of actions against Dr. Harker speak volummes to how and why the court has so far departed from the accepted and usual course of judicial proceedings. The relevant part of the order reads as follows:

> "Finally, it should be noted that the plaintiff has already filed two lawsuits in this court relating to his termination, both patently without merit. The plaintiff has already caused the court and the defendants to expend considerable time and expense in responding to his groundless suits. The instant complaint will be dismissed with prejudice, as the plaintiff is clearly trying to harass the defendants. Because the plaintiff is pro se, the court will decline the defendants' suggestion that the court levy sanctions. However, the court will not hesitate to impose sanctions in the future if the plaintiff continues to pursue non-meritorious, vexations litigation." district court order of Michael M. Mihm

This is Judge Michael M. Mihm's assessment of Dr. Harker's considerable effort and extensive documentation of a firing based on eleven charges that could be shown to be false. (An abridged version of the initial pleading is present as Appendix D at page 69 this

document.)

A cursory review of the materials associated with this petition will document how the court has so far departed from the accepted and usual course of judicial proceedings. It is self evident from the material presented that there is a need for the Court's supervisory power to be used to put this matter back on a course of justice.

CONCLUSION

Recently there was a high profile case involving Paula Jones and the President of the United States. The case was initially filed in the district court. After considerable activity by the lawyers in that case, the case was dismissed by the court. As I understand things the court found there was not a basis for a case. That decision was appealed and ultimately the parties agreed to a settlement.

In this instance the *pro se* litigant is not even being given the chance to develop the various aspects of his case within the district court.

The court has not looked at the relationship between the seventeen defendants and their relationship to the deprivation of due process presented. The court has rejected out of hand the idea that there was a conspiracy among some of these individuals to deprive the plaintiff of his right to due process. No opportunity was given for the plaintiff to elaborate further on the merits of the case.

The court rejected the notion that actions were taken "under color of law" and yet goes on at great length to explain that the two agencies are in fact state entities. If actions taken by them do not constitute the theoretical basis for this concept than what can?

In the *pro se* pleading the litigant is supposed to be given the benefit of the doubt and the document interpreted most liberally. If that were done here the matter would have moved forward in the district court. If this matter had moved forward in district court I am sure there would have been some effort to resolve it by the various parties involved. That did not happen and the plaintiff has been financially and professionally ruined. This in spite of the fact that it is well known and easily demonstrated that Harker was not guilty of any of the eleven charges brought against him to justify his termination from Western Illinois University.

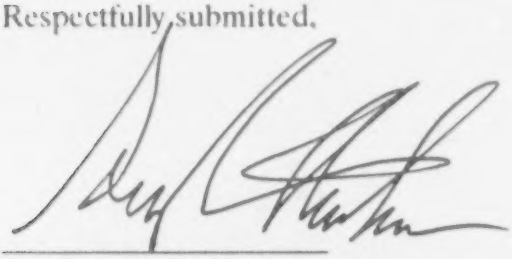
It would appear that the court has gotten so wrapped up in the application of very narrowly defined issues and the technicalities of their interpretation that it can not see a blatant miscarriage of justice when it is confronted with one. The court fails to see that the product here is more than the sum of its parts.

The court has been to quick to accept the various legal red herrings put forth by trained lawyers and failed to look at the issues presented by Harker within the context of the larger issues of constitutional rights of due process and free speech.

Harker asserts that a number of rights have been taken from him by the actions of WIU et al. and he asks the court not to deprive him of another basic right, and that is to be able to petition the Government for a redress of the grievances described in this cause. The action by the district court to ignore the substance of a *pro se* pleading and then to suggest that the effort is a groundless suit intended to harass the defendants is an affront to the very concepts which underlie a fair and meaningful judiciary.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Dr. George R. Harker, *pro se* Date: April 7, 1999

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APPENDIX A COURT OF APPEALS ORDER

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Submitted January, 1999*
January 21, 1999

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

GEORGE R. HARKER,
Plaintiff-Appellant

Appeal from the United States District Court for the Central District of Illinois

No. 98-1318 v.

No.97-1147
Michael M. Mihm, Chief Judge

UNIVERSITY PROFESSIONALS OF ILLINOIS, ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD, MARK T. DUNN, et al.,
Defendants-Appellees.

ORDER

In 1991, George Harker was terminated from his tenured professorship in the Department of Recreation and Park Administration at Western Illinois University ("WIU"). Five years later, Harker began filing civil rights suits against WIU, individual

*After an examination of the briefs and record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and record. See Fed. R. App. P.34(a); Cir. R.34 (f).

officials and attorneys of WIU, the university's labor union (University Professionals of Illinois or "the union"), and the Illinois Educational Labor Relations Board (the "IELRB"). Harker claimed that the defendants had violated his constitutional rights to free speech and due process under the First and Fourteenth Amendments. The district court concluded that the Eleventh Amendment barred Harker's actions against WIU and the IELRB, and that Harker's other actions were time-barred. Harker appeals. Because the district court's conclusions were correct, we affirm.

At the date of his termination in 1991, Harker had been a faculty member at WIU for 21 years. In 1996, having exhausted lengthy and unsuccessful administrative grievance procedures before the IELRB, Harker filed an action in the district court under 42 U.S.C. §§ 1983, naming WIU as the defendant. He quickly sought to voluntarily dismiss his case without prejudice, a request that was granted by the court pursuant to Fed. R. Civ. P. 41(a)(2). In 1997, Harker filed another suit. In the new action, he sued the Board of Trustees, of WIU, seventeen individuals affiliated with the university, the union, and the IELRB. Harker brought his First and Fourteenth Amendment claims under 42 U.S.C. §§ 1983, 1985(3) and 1986. He alleged that he had been terminated because WIU officials were unhappy with the fact that he was an authority in the field of public nudity (he is the author of a book on the subject), had discussed the topic in his course entitled "The Philosophy of Leisure," and had served as an expert witness in trials dealing with the issue. He further alleged that the university officials, the union and the IELRB had conspired to deny him due process during the termination proceedings and during the administrative grievance procedure. Harker sought punitive and monetary damages as well as reinstatement.

The district court determined that (1) the Eleventh Amendment barred Harker's claims against WIU and the IELRB; (2) the claims against WIU were also time-barred; (3) the private individuals Harker had sued under § 1983 were not state actors; (4) Harker's claims against the union could be brought only before the IELRB; and (5) Harker's Claims under § 1985 contained no

allegation of a conspiracy based on class-based or racial animus. concluding, in addition, that Harker was "clearly trying to harass the defendants," the court dismissed his suit with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) and 12 (b)(6).

On appeal, Harker renews the claims he made before the district court. We review *de novo* a district court's grant of a motion to dismiss under Rule 12(b)(6), "accepting the well-pleaded allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff." *Strasburger v. Board of Educ., Hardin County Community Unit Sch. Dist. No. 1*, 143 F.3d 351, 359 (7th Cir. 1997). a 12 (b) (6) dismissal "is proper only where the plaintiff can prove no set of facts that would entitle him to relief." *Mallett v. Wisconsin Division of Vocational Rehabilitation*, 130 F.3d 1245, 1248 (7th Cir. 1997). "Furthermore, we construe complaints drafted by pro se plaintiffs liberally," *Id.*

The district court ruled correctly that the Eleventh Amendment barred Harker's claims against WIU and the IELRB. We have already concluded that "Western Illinois University is the State of Illinois for purposes of the Eleventh Amendment." *Davidson v. Board of Governors of State Colleges and Univs. for Western Illinois Univ.*, 920 F.2d 441,442 (7th Cir. 1990). *See also Quern v. Jordan*, 440 U.S. 332, 341 (1979) (noting that Congress did not intend "by the general language of § 1983 to override the traditional sovereign immunity of the States"). In 1996, WIU's Board of Governors was abolished, and all the rights, powers, duties, assets, outstanding contracts, agreements and bonds previously vested in it were transferred to the Board of Trustees, 110 ILCS 605/10, 690/35. Because the Board of Governors was an arm of the state, *Ellis v. Board of Governors*, 102 Ill.2d 387, 393 (Ill. 1984), the holding in *Davidson* also now applies to the Board of Trustees.

We turn next to the question whether the IELRB is also an arm of the state, Factors to be considered in determining whether an entity is an arm of the state include whether the state is the source of the entity's funding; whether the state is financially responsible for liabilities and obligations incurred by the entity; and whether the function performed by the entity is traditionally a state or local

function. *See, e.g., Lake County Estates, Inc. v . Tahoe Regional Planning Agency*, 440 U.S. 391, 400-02 (1979); *Benning v. Board of Regents of Regency Univs.*, 928 F.2d 775,777 (7th Cir. 1991); *Kashani v. Purdue University*, 813 F.2d 843,845 (7th Cir. 1987). It may be debatable whether the act which established the IELRB (Illinois Public Act 83-1014:"[a]n act to establish the right of educational employees to organize and bargain collectively, to define and resolve unfair practice disputes") defines the IELRB's function as a state rather than a local function. Any ambiguity regarding this matter, however, is resolved by the fact that the IELRB's members are appointed by the Governor of Illinois and paid by the State of Illinois 115ILCS 5/5(a), (b) and (c). The IELRB, of course, has no authority to levy taxes, but depends rather on the Illinois General Assembly to appropriate the funds necessary for its operation. Moreover, it receives no appropriation to pay awards to successful plaintiffs; any judgment against it would clearly have to be paid from the State's Public funds. *See Benning*, 928 F 2d at 777 ("the critical inquiry is whether a judgment would deplete the state treasury"). Therefore the IELRB "is the State of Illinois for purposes of the Eleventh Amendment," *Davidson*, 920 F.2d at complaints against the Board of Trustees of WIU and the IELRB to the extent Harker was seeking damages from these state entities.

The Eleventh Amendment, however, does not apply to prospective suits for reinstatement bought against officials of WIU in their official capacity, and Harker reminds us that his suit against the members of the Board of Trustees is only for "injunctive" relief. *See Kashani*, 813 F.2d at 848. Although this may explain why Harker dismissed his initial complaint and brought a new one against seventeen individual defendants, Harker's claims against these officials are now time-barred. Because Illinois' statute of limitations for personal injury claims is two years, a two-year statute of limitations govern 1983 claims in Illinois. *Ashafa v. City of Chicago*, 146 F.3d 459, 461 (7th Cir. 1998). The rule is the same for claims brought under 1985(3) and 1986. *See Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 775 n.2 (7th Cir.1995); *Wilson v. Giesen*, 956 F.2d 738, 741 n.4 (7th Cir. 1992) Section 1983 claims "accrue when the plaintiff

knows or should know that his or her constitutional rights have been violated." *Kelly v. City of Chicago*, 4 R. 3d 509, 511 (7th Cir. 1993). In employment termination cases, the date of accrual is the date of the adverse employment decision. ID. at 512. Here, Harker's claim accrued at the latest in 1991, when he was informed that he had been terminated.

To be sure, the two-year period may be tolled if the plaintiff "does not have and cannot with due diligence obtain information essential to bringing a suit." *Anderson v. Board of Regents of the University of Wisconsin System*, 140 F.3d 704, 706 (7th Cir. 1998) (internal quotation omitted). Harker argues that he could not know that his rights had been violated until his grievance procedures came to an unsuccessful conclusion in 1996. But it is well settled that the pursuit of grievance procedures, "or some other method of collateral review of an employment decision, does not toll the statute of limitations," *Kelly*, 4 F.3d at 512 (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980)). See also *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (applying rule stated in *Ricks* to 1983 context).

Nonetheless, Harker appears to suggest, as an excuse for the untimeliness of the present cause, that state and administrative remedies must be exhausted prior to filing § 1983 claim in federal court. The suggestion is untenable in light of the Supreme Court's decision in *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 507(1982), that a litigant is not required to exhaust state remedies before bringing suit under § 1983." *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 427 (1987) (citing *Patsy*, 457 U.S. at 516). Thus, under the *Patsy* doctrine, a plaintiff may bring a collateral attack on a state administrative procedure in federal court for violation of due process. *See Van Harken v. City of Chicago*, 103 F.3d 1346, 1349 (7th Cir. 1997). Therefore, Harker could and should have brought his § 1983 claims within two years of termination in 1991, and those claims are presently time-barred.

Harker also brought claims under § 1985(3) and § 1986 against the union, alleging a conspiracy with the other defendants to deprive him of his federal rights and a knowing failure to prevent the accomplishment of this deprivation. With respect to these claims, we

note that "mere allegations of ...conspiracy do not demonstrate that the [union] acted under color of state law and are not sufficient to survive a motion to dismiss." *Fires v. Helsper*, 146 F.3d 452, 458 (7th Cir. 1998). In addition, Harker's complaint fails to allege any racial or other class-based animus, and thus fails to state a cause of action under 1985(3) *See Bowman v. City of Franklin*, 980 F.2d 1104,1109 (7th Cir. 1992). At any rate, Harker could and should also have brought his § 1985(3) and § 1986 claims within the period defined by the two-year statute of limitations. *Sanders v. Venture Stores, Inc.*, 56 F.3d 771,775 n.2 (7th Cir. 1995). While it is often difficult to discern the legal nature of Harker's claims, the district court properly observed that his claims against the union seem to boil down to the assertion that the union's attorney inadequately represented him during the 1991 termination proceedings. Harker fails to point to any specific action of which he could not have had knowledge with two years of his termination, and which would tend even remotely to indicate that a conspiracy existed between the union and state officials. Harker "may not sit back and accumulate [an entire series of] discriminatory acts and sue on all [of them] within the statutory period applicable to the [most recent] one." *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 282 (7th Cir. 1993). Thus, these claims should also have been dismissed as time-barred.

Finally, Harker also moved to disqualify the union's lawyers, arguing that they had a conflict of interest because they had represented him during his pre-termination proceedings. Because the court properly granted the motion to dismiss, the motion to disqualify counsel was moot. Therefore we need not reach the issue of whether that representation was "substantially related" to the present litigation. *See Schiessle v. Stephens*, 717 F.2d 417, 420 (7th Cir. 1983).

We conclude that Harker's claims against WIU and IELRB were properly dismissed as barred by the Eleventh Amendment , and that not only his § 1983 claims, but all of his other claims as well should have been dismissed as barred by the two-year statute of limitations applicable to § 1983, § 1985(3) and § 1986.

Harker also brought two pendent state causes of action against all of the defendants: intentional interference with an

employment relationship and retaliatory discharge. "[P]endent jurisdiction is a matter of discretion, not of plaintiff's right. It is well established that if federal claims are dismissed before trial, the federal district courts should generally dismiss the state law claims ar well." *Vukadinovich v. Board of School Trustees of the Michigan City Areas Schools*, 978 F.2d 403, 415 (7th Cir. 1992). Therefore, the district court properly dismissed Harker's pendent state law claims as well. The district court's judgment is
AFFIRMED.

APPENDIX B ORDER U.S. DISTRICT COURT

FILED
JAN 11, 1998
JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DR. GEORGE R. HARKER
Plaintiff,
vs. No. 97-1147
WESTERN ILLINOIS UNIVERSITY, et al.,)
Defendants.

ORDER

The plaintiff, George Harker, has brought this civil rights action purportedly pursuant to 42 U.S.C. § § 1983, 1985 and 1986. The plaintiff claims that the defendants, Western Illinois University, the Illinois Educational Labor Relations Board, and various individuals affiliated with the university and its labor union, conspired to discharge the plaintiff from his tenured teaching position for alleged violations of university policy when in reality he was being punished for "the nature of his course content and teaching style" [apparently the plaintiff advocates public nudity]. Although the termination process and related appeals lasted five years, the plaintiff maintains that he was denied a meaningful hearing or other due process. This matter is before the court for consideration of the various defendants' motions to dismiss. For the reasons stated in this order, the motions will be allowed and the case will be dismissed.

The court must first address the plaintiff's motion to disqualify Elizabeth Joffe and the firm of Cornfield and Feldman from representing any defendant. The motion will be denied. The law firm

represented the Union, not the plaintiff, during the contract grievance procedure through which the plaintiff's termination was challenged. [The plaintiff is suing the union attorney who represented him in the termination proceedings.] The court is unpersuaded that the plaintiff had an attorney-client relationship with the law firm of Cornfield and Feldman, *see English v. Iron Workers, Local 46*, 654 F. 2d 473 (7th Cir. 1981); *see also Tisby v. Buffalo General Hosp., et al.*, 157 F.R.D. 157 (W.D.N.Y.1994). In any event, Ms. Joffe did not join the firm until March 1, 1996. Disqualification is not warranted under the circumstances of this case. Elizabeth Joffe (and the firm of Cornfield and Feldman), as regular counsel for the union, its officers and members, will be permitted to continue representing them in this action.

Turning to the motions to dismiss, it is well established that *pro se* complaints are to be liberally construed. *Haines v. Kerner* , 404 U.S. 519 (1972)), *reh'g denied*, 405 U.S. 948 (1972). *See also Tarkowsi v. Robert Bartlett Realty Company*, 644 F.2d 1204 (7th Cir. 1980). They can be dismissed for failure to state a claim only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines*, 404 U.S. at 521; *Gregory v. Nunn*, 895 F.2d 413, 414 (7th Cir. 1990).

When considering whether to dismiss a complaint for failure to state a claim upon which relief can be granted, the court takes the allegations in the complaint as true, viewing all facts-- as well as any inferences reasonably drawn therefrom--in the light most favorable to the plaintiff. *Bethlehem Steel Corp. v. Bush*, 918 F.2d 132,1326 (7th Cir. 1990). Dismissal should be denied whenever it appears that a basis for federal jurisdiction in fact exists or may exist and can be stated by the plaintiff. *Tarkowski*, 644 F.2d at 1207, quoting *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972).

FACTS

The plaintiff was a tenured professor at Western Illinois University for twenty-one years. He was terminated by the University on June 20 or 21, 1991, after an eight-month hearing process before a panel of five of his tenured peers at the university.

Following his discharge, the plaintiff brought numerous

challenges pursuant to the terms of his collective bargaining agreement. The plaintiff filed for unemployment compensation, which was denied because he had been terminated "for cause." The plaintiff initiated two sperate arbitration proceedings, both of which were decided against him. The plaintiff filed a claim before the Illinois Educational Labor Relations Board claiming unfair labor practices. The IELRB issued a decision adverse to the plaintiff. The plaintiff filed an appeal, which was also decided in favor of the university and affirmed his discharge.

The plaintiff has filed two civil rights actions relating to the above-referenced events. The plaintiff voluntarily withdrew the first lawsuit (*Harker v. Western Illinois University, et al.*, Case Number 96-1338) after the magistrate judge issued a report and recommendation finding that the case should be dismissed with prejudice.

The instant complaint lists a number of alleged procedural improprieties in both the pre-termination hearing and the ensuing grievance proceedings. The plaintiff contends that the defendants conspired against him during the drawn-out proceedings because the plaintiff is a "recognized authority," and outspoken advocate, of public nudity. The plaintiff claims violations of his First Amendment rights and his right to due process. The plaintiff seeks reinstatement and back pay, as well as compensatory and punitive damages.

DISCUSSION

First, the plaintiff has failed to serve the defendants properly. Rules 4(c) and (e) of the Federal Rules of Civil Procedure dictate the requirements for service of the summons and complaint. Service by certified mail is not permissible. However, the court will not delay dismissal by requiring proper service since, irrespective of service problems, the complaint fails to state an actionable federal claim against the defendants.

To the extent that this lawsuit concerns the plaintiff' discharge from Western Illinois University, the complaint is time-barred. The supreme court has held that a state's general or residual personal injury statute of limitations should be applied in determining the time limitation for actions brought under 42 U.S.C. § 1983. *See Wilson v. Garcia*, 471 U.S. 261, 275 (1985); *see also Owens v. Okure*, 488 U.S.

235 (1989). In Illinois, the personal injury limitation period is two years. 735 ILCS § 5/13-202 (1994); *see also Farrell v. McDonough*, 966F.2d 279, 282 (7th Cir. 1992), *cet. denied*, 506 U.S. 1084 (1993).

In the instant case, any cause of action regarding the plaintiff's discharge accrued on June 21, 1991, when his employment was terminated. Because the plaintiff waited until April 21, 1997, to initiate this lawsuit, his claims [whether they relate to wrongful discharge, discrimination, retaliatory discharge, intentional interference with business relationships, or any other grounds] are time-barred.

The plaintiff cannot extend the limitations period by labeling his termination "one particular event in a series of events that is still continuing." Nor has the plaintiff provided any authority to support his proposition that the limitations period "must run" from the date he finally exhausted administrative remedies. To the contrary, the Supreme Court has expressly rejected the notion that post-deprivation proceedings toll the statute of limitations. *See Delaware State College v. Rick*, 449 U.S. 250 (11980); *Chardon v. Fernandez*, 454 U.S. 6 (1981); *see also Kelly v. City of Chicago*, 4 F.3d 509, 511-12(7th Cir. 1993). The plaintiff was "wronged"-- and was aware that he had been wronged--when he was terminated.

In addition, the doctrine of *res judicata*, or claim preclusion, bars relitigation of a claim that a party raised or could have raised in a prior adjudication. The Supreme Court has held that agency adjudication of a factual matter can be *res judicata* in later proceedings. *United States v. Utah Construction & Mining C.*, 384 U.S. 394, 422 (1966). The plaintiff has already challenged his termination through the lengthy university hearing and appeal process, and then by filing suit before the IELRB. The plaintiff cannot prolong the process by mounting a collateral attack against the termination proceedings under the guise of a dubious civil rights action.

Even assuming arguendo that this case is not barred by the statute of limitations or by claim preclusion, the plaintiff sues many individuals who are not state actors. In order to be liable under 42 U.S.C. § 1983, a defendant must have acted under color of state law in addition to having violated a constitutional right. *Papapetropoulous*

v. Milwaukee Transport Services, Inc. , 785 F.2d 591, 595 (7th Cir. 1986); *Reichenberger v. Pritchard*, 660 F.2d 280, 284 (7th Cir. 1981). The plaintiff cannot sue a private labor union, its attorney and officers, or individual faculty members under civil rights statutes simply by claiming *ipse dixit* that they "acted under color of state law" or "hid under the color of law," without specifying the nature of the alleged state action. The mere fact that certain proceedings are governed by state law does not necessarily render the proceedings actionable under § 1983. *Accord, see Winterland Concessions Company v. Treala*, 735 F.2d 257, 262 (7th Cir.1984).

Despite liberal pleading requirements, the plaintiff cannot constitutionalize his claims by making boilerplate allegations of a conspiracy between private persons and state officials. *Moore v. Marketplace Restaurant, Inc.*, 754 F. 2d 1336, 1352-53 (7th Cir. 1985). The Seventh Circuit has specifically held that an unsupported allegation of conspiracy is insufficient to show that a union acted as a state instrumentality. *Leahy v. Board of Trustees of Cmnty Coll. Dist. No. 508*, 912 F.2d 917, 921-22 (7th Cir. 1980); *see also Storlazzi v. Bakery*, 894 f. Supp. 494, 500-501 (D.Mass. 1995), aff'd 68 F.3d 455 (1995). In a report and recommendation dated October 18, 1996 in 96-1338, the magistrate judge concluded that the union was a private organization and that there was no state action despite the fact that certain members were state employees. The plaintiff cannot resuscitate his claims simply by crying conspiracy or by noting that the organization is governed by state labor law. The Plaintiff has failed to articulate a colorable cause of action under § 1983.

The plaintiff likewise has no claim under section § 1985. The purpose of 42 U.S.C. § 1985 is to redress civil rights conspiracies based on class-based or racial animus. *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Bowman v. City of Franklin*, 980 F.2d 1104 (7th Cir. 1992). The plaintiff's arguments to the contrary, relying solely on the wording of the statute itself, ignore longstanding case law.

The plaintiff's claims against the union [and individuals affiliated with the union] essentially boil down to the plaintiff's assertion that he was not adequately represented. Public employers such as Western Illinois University are specifically excluded from suit

in federal court under the Labor Management Relations Act that a union breached its duty of fair representation. 29 U.S. C. § 152(2). such claims are within the exclusive jurisdiction of the Illinois Educational Labor Relations Board. *Board of Education of Community School District No. 1 v. Compton*, 123 Ill. 2d 216 (1988); *Foley v. American Federation of State, County and Municipal Employees*, 199 Ill. app.3d 6 (1990). The district court cannot hear such claims. *Jackson v. Temple University*, 721 F.2d 931, 933 (3rd Cir. 1983). In fact, the plaintiff already pursued that claim, which the IELRB considered and rejected.

As the court also advised the plaintiff in his previous lawsuit, any claims against Western Illinois University and the Illinois Educational Labor Relations Board are barred by the Eleventh Amendment. The Eleventh amendment bars an action for damages in federal court against the state and state agencies. *Kroll v. Board of Trustees of the University of Illinois*, 934 F.2d 904, 907 (7th Cir. 1991), cert. denied, 502 U.S. 941 (1991). such entities are not "persons" who may be sued for damages under 42 U.S. C. § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 45 (1989).

In sum, it is plain that the plaintiff could not prove a set of facts which would entitle him to relief in federal court, even assuming that the court has jurisdiction to entertain the plaintiff's claims. *Conley v. Gibson*, 355 U.S. 41 (1957). Accordingly, the defendants' motions to dismiss the compliant will be granted. Because the plaintiff's claims are time-barred and/or are res judicata or not cognizable under 42 U.S. C. sec. 1983, he could not save his case by amendment. In light of the dismissal of the plaintiff's federal claims, his state tort claims will be dismissed as well. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966); *Freedom From Religion Foundation, Inc. v. Zeilke*, 845 F.2d 1463, 1471 n. (7th Cir. 1988); 28 U.S.C. 1367 (c)(3).

Finally, it should be noted that the plaintiff has already filed two lawsuits in this court relating to his termination, both patently without merit. The plaintiff has already caused the court and the defendants to expend considerable time and expense in responding to his groundless suits. The instant complaint will be dismissed with

prejudice, as the plaintiff is clearly trying to harass the defendants. Because the plaintiff is pro se, the court will decline the defendants' suggestion that the court levy sanctions. However, the court will not hesitate to impose sanctions in the future if the plaintiff continues to pursue non-meritorious, vexations litigation.

IT IS THEREFORE ORDERED that the plaintiff's motion for disqualification of attorney (docket #34) is denied.

IT IS FURTHER ORDERED that the plaintiff's motion for reconsideration (docket #53) is allowed. The court has considered the plaintiff's reply brief (docket #47), notwithstanding the provisions of Local Rule 7.1 (B).

IT IS FURTHER ORDERED that the defendants' motions to dismiss (docket ##4,9,35,42, and 50) are allowed. The complaint is dismissed, with prejudice, pursuant to Fed. R. Civ. P. 12(b) (1) and 12 (b) (6). The case is terminated. The defendants are awarded costs of suite.

IT IS FURTHER ORDERED That the plaintiff's motion for hearing (docket #54) is denied as moot.

Enter this 15th day of January, 1998.

"s/Michael M. Mihm"

MICHAEL M. MIHM
CHIEF U.S. DISTRICT JUDGE

APPENDIX C ABRIDGED BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Dr. George R. Harker	)	
	)	
Plaintiff - Appellant	)	No. 98-1318
	)	
v.	)	
	)	
	)	
UNIVERSITY PROFESSIONALS OF ILLINOIS, ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD, MARK T. DUNN, et. al.,)	)	
	)	
Defendants - Appellees	)	

The matter before this court is an appeal of a decision made in the District Court by District Court Judge Michael M. Mihm, District Court No.: 97 C 1147.

BRIEF OF APPELLANT

TABLE OF STATUES
REFERENCES CITED FOR JURISDICTION

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ... (As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub. L. 97-164, Tite I § 124, 96 Stat. 36.)

Jurisdiction original suit reference:

§ 1343. Civil rights and elective franchise

(a)The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States, or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(As amended Sept. 3, 1954, c. 1263,§ 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637; Dec. 29, 1979, Pub. L. 96-170, § 2, 93 Stat.1284.)

ILLINOIS SUPREME COURT RULES

"Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably relieves the representation will not adversely affect the relationship with the other client; and (2) each client consents after

disclosure."

"Rule 1.9 CONFLICT OF INTEREST: FORMER CLIENT (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the former client consents after disclosure."

"Rule 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE (a) No lawyer associated with a firm shall represent a client when the lawyer knows or reasonably should know that another lawyer associated with that firm would be prohibited from doing so by Rules 1.7, 1.8(c) or 1.9 except as permitted by Rules 1.10(b), (c), or (d), or by Rule 1.11 or Rule 1.12."

TABLE OF OTHER AUTHORITIES

Harker, George R., He Wouldn't Drink the Hemlock: The Firing of Dr. Leisure. Dr. Leisure 1993.

Knibb, David G., Federal Court of Appeals Manual, Third Edition, West Publishing Co. 1997.

BRIEF OF APPELLANT

The matter before this court is an appeal of a decision made in the District Court by District Court Judge Michael M. Mihm, District Court No.: 97 C 1147. Judge Mihm ruled that the plaintiff, Dr. George R. Harker did not have any basis for a claim in federal court. Judge Mihm did not accept the claim that Harker's First and Fourteenth Amendment rights had been violated and that he was entitled to relief under 42 § 1983.

CERTIFICATE AS TO RULINGS AND RELATED CASES

It is apparent from Judge Mihm's ruling that he relied heavily on decisions arising out of an earlier case initiated by Dr. Harker in 1996. That case was 96 C 1338. Judge Joe B. McDade presided.

The case was dismissed without prejudice by Judge McDade when Dr. Harker withdrew it.

Dr. Harker withdrew the case when the Magistrate Judge recommended to District Court Judge McDade that the case had no merit.

Plaintiff Harker is acting pro se in these matters. He has no previous experience with the federal judicial system from the perspective of a litigant. He has never before filled a case in the District Court. Harker thought that by withdrawing his case and making the obvious numerous corrections he would be facilitating the process. However, that does not seem to be the case. Numerous decisions made in the first case were just carried forward to the second without reviewing the materials presented, i.e. additional case citations that supported plaintiff Harker's position.

Plaintiff Harker would have preferred to hire competent legal council but the damage done to him by the defendants in this case had damaged his reputation to the point that he could not find meaningful employment. In short he could not afford counsel of any kind. He had to do it himself or not at all.

STATEMENT REGARDING ORAL ARGUMENTS

I do not believe there is a need for oral arguments. It is self evident that there is no issue of jurisdiction. I am asserting that my

Constitutional Amendment right to substantive due process has been violated (Fourteenth Amendment). I have presented substantial evidence regarding how this has occurred. It is clear from the case law cited in this document that this is an appropriate issue under 42 § 1983.

The District Court erred in not reviewing in depth the documentation presented with this case 97 C 1147. Instead it relied on decisions associated with my previous case 96 C 1338 which had been withdrawn because of a number of technical and other problems associated with my being a first time pro se litigant.

George R. Harker

JURISDICTIONAL STATEMENT

The Federal Civil Rules Handbook (1996) effectively lays the groundwork for the jurisdictional statement as follows:

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. ... (As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub. L. 97-164, Tite I § 124, 96 Stat. 36.)

The jurisdiction of the original suit derives from the following:

§ 1343. Civil rights and elective franchise

(a)The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law,

statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States, or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(As amended Sept. 3, 1954, c. 1263,§ 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637; Dec. 29, 1979, Pub. L. 96-170, § 2, 93 Stat.1284.)

The Practitioner's Handbook for Appeals for the Seventh Circuit explains why the Court of Appeals for the Seventh Circuit has jurisdiction in this matter as follows:

"The jurisdiction of the Court of Appeals for the Seventh Circuit extends to all criminal appeals and virtually all civil appeals from the seven district courts within the circuit (the Northern, Southern and Central Districts of Illinois; the Northern and Southern Districts of Indiana; and the Eastern and Western Districts of Wisconsin)." (Practitioner's Handbook for Appeals Seventh Circuit 1996 Edition, page 16.)

This is an appeal of a Judgment in a Civil Case 97-1147, "It is ordered and adjudged that this case is dismissed with prejudice, pursuant to Fed. R. Civ. P. 12(b)(1) and 12 (b)(6), with cost of suit" entered this 16th day of January, 1998. (Central District of Illinois.)

FACT SHEET

August 1987. Harker's article on nude sunbathing appears in Recreation and Parks Magazine.

Summer of 1987 Harker prepares an affidavit to be presented in the appeal of *Craft v. Hodel* (1988) United States District Court, District of Massachusetts 683 F.Sup. 289 (D.Mass. 1988).

December 1987. Harker is asked to visit Maui and prepare an article regarding the controversy over nude bathing at Little Beach on Maui.

October 1989. Harker is asked to testify in Rochester, New York on behalf of nine women charge with exposure of their breasts. *People v David* (1989) City Court of Rochester (New York) 146 Misc.2d 115, 549 N.Y.S.2d 564 (City Ct. 1989) Rev'd, 152 Misc.2d 66,

585 N.Y.S.2d 149 (County Ct. 1991).

November 1989. Harker will be asked to testify at a public hearing in Hawaii the week before Thanksgiving in November of 1989. The public hearing derives from a case involving Peter Rowley the individual who invited Dr. Harker to Maui. *State v. Rowley* (1988) Supreme Court of Hawaii 70 Haw. 135,74 P.2d 1233 (1988).

February 1989. Harker sanctioned by university with regard to his having testified in Hawaii. He is docked some three days pay for not being back Friday. He had testified on Thursday. It is an eight hour direct flight to Chicago.

November 1989. Asked to testify the week after Thanksgiving in Florida. University interferes but it does not matter since the judge has thrown out the case. It will be reinstated and the plaintiffs will prevail. *The Naturist Society, Inc., and T.A. Wyner v. Fillyaw* (1990) United States District Court, S.D. Florida, Fort Lauderdale Div. 736 F.Supp 1103 (S.D. Fla. 1990) *Remanded*, 958 F.2d 1515 (11th Cir. 1992) *On remand*, 858 F.Supp. 1559 (S.D. Fla. 1994)

January 1990. Harker testified to the Board of the Department of Land and Natural Resources at Hilo, Hawaii.

June 1990. Western Illinois University advises Harker that they will seek his termination.

September 1990 through April 1991. A Termination hearing is held for a couple of hours each week. (39 hours in all)

October 1990. The American Sunbathing Association publishes Dr. Harker's book, *Creation and Management Guide to clothing optional beaches and parks*.

June 20, 1991 Dr. Harker is fired from Western Illinois University.

Fall 1993 Dr. Harker's book *He Wouldn't Drink the Hemlock: The Firing of Dr. Leisure* is published.

August 1994. Grievance hearing held.

March 1995. Arbitration hearing scheduled.

May 10, 1995. Unfair Labor Practice Charge filed against the university and the union.

September 1995. Results of Arbitration.

June 10, 1996. File Federal civil action, File No. 96-1338

September 1996. Results of appeal to ILERB.
December 1996. Withdraw 1st Federal Civil Action.
June 1997. File Federal Civil Action, File No. 97-1147.

STATEMENT OF ISSUES

Issue: Jurisdiction

The most crucial issue is jurisdictional. Does the Circuit Court have jurisdiction in the matter brought before it by plaintiff Harker. Harker is alleging a violation of his civil rights under color of law. If Harker has a case as charged then there is little question that the court does have jurisdiction. However the position of the District Court is that there is no civil rights action and thus there is no jurisdiction.

The wording of the suit regarding jurisdiction and venue was as follows:

"1. This action is brought pursuant to 42 U.S.C. §1983, §1985, §1988 and the First and Fourteenth Amendments of the United States Constitution Jurisdiction is founded upon 28 U.S.C. § 1331 and §1343 (1)(2)(3)(4), and the aforementioned statutory and constitutional provisions.

2. Venue is proper under 28 U.S.C. §1391(b).

3. This Court has jurisdiction of Count III pursuant to its "supplementary jurisdiction" under 28 U.S.C. §1367."

Issue: Proper Service

Harker is a pro se litigant with limited knowledge on the procedures associated with pursuing justice in the judicial system. Fully aware of this, Harker has sought the advice of the Clerk of the District Court on such technical matters as how to file and how to serve individuals one is attempting to sue. Harker carefully followed the procedures as explained by the Clerk of the District Court. The District Court in the order being appealed rejects Harkers procedure as not correct and cites this as another reason to dismiss the case. It is clear that service could be perfected but since the Court has ruled there is no cause there is no need to do so.

Issue: Union State Actor

Other issues to be reviewed include the dismissal of the union and its representatives from a suit brought under color of law because they are not state actors. Harker finds that the case law makes clear that when a symbiotic relationship exists between the actors and the state the players are considered state actors for purposes of this act 42 U.S.C. §1983. Because the District Court dismissed the allegation that a civil rights issue existed it dismissed the union and its representatives from those that could be appropriately sued. Again the resolution of this issue seems dependent on whether a Civil Rights action can be demonstrated.

Issue: Statue of Limitations

Statue of limitations. The District court asserts that the time limit in which to file a cause of action began on June 20, 1991. Remember the District court has rejected the concept of discrimination under color of State law. Therefore it develops its position from other legal theories. "To the extent that this lawsuit concerns the plaintiff's discharge from Western Illinois University, the complaint is time-barred." (page 6, Order). "Nor has the plaintiff provided any authority to support his proposition that the limitations period "must run" from the date he finally exhausted administrative remedies."(page 6, Order).

Harker believes that the issue is substantive due process and this falls under the concept of discrimination under color of State law. If that premise is accepted than other factors come into play regarding any statutes of limitations. Case law supports this contention and is presented in Argument.

Issue: Attorney Conflict of Interest

The District Court rejected the notion that the attorney representing the union and another attorney named in the suit represented a conflict of interest.

"... motion to disqualify Elizabeth Joffe and the firm Cornfield and Feldman from representing any defendant." (page 2, Order).

"The court is unpersuaded that the plaintiff had an attorney-

client relationship with the law firm of Cornfield and Feldman." (page 2, Order).

Harker believes that court erred in not properly understanding the nature of the client attorney relationship that was the basis for this request to disqualify. That the attorneys for the firm of Cornfield and Feldman have represented to the court that a attorney/client relationship did not exist between Harker and Hillman, further supports Harker's contention of a conspiracy to interfere with Harker's rights to due process..

The issue is whether there is a conflict of interest between any attorney associated with Cornfield and Feldman representing some of the other individuals named in this suit when at least two of the firm's attorneys represented the plaintiff in past actions.

Illinois Supreme Court Rules address this issue and numerous examples exist in case law to support Harker's claim. The documentation is presented in Argument.

Issue: Public Interest

Being a teacher in a public institution of higher learning brings with it certain responsibilities and obligations. One of which is to share the expertise of that individual with others for the benefit of the public good, i.e. knowledge of public nudity laws and their application to the woman's rights issue. Harker is not an advocate of public nudity, rather he is an authority on the issue. By virtue of the clear trends within this area it is obvious why he is sought out by the advocates of public nudity and women's rights. Opponents of Dr. Harker's point of view effectively used the provisions of the university contract to stifle his voice in such matters. A clear and intentional violation of Harker's constitutional rights of association and free speech.

Issue, does Harker have a right to appear in court and offer his expert opinion without retribution from the university? Does Harker have a right to teach his courses and grade his exams in the manner consistent with his training and teaching objectives?

Issue: Res Judicata

The District Court suggest that various issues could have been dealt with in the administrative review by the Illinois Educational Labor Relations Board (IELRB) and thus would be considered *res judicata*. "The Supreme Court has held that agency adjudication of a factual matter can be *res judicata* in later proceedings." (page 7, Order.)

Plaintiff Harker asserts that the failure of the administrative review process to review any of the issues associated with due process and other constitutional rights is the crux of the problem and why this matter must be heard in a Federal court.

The issue is whether Harker was afforded due process by the mechanism in place to monitor the procedures used in his termination. That a procedure that was significantly flawed with regard substantive due process can be accepted *res judicata* in later proceedings suggests an inherent disregard for the constitutional rights of the Fourteenth Amendment. The issue again is whether plaintiff Harker received substantive due process.

Conspiracy to Interfere with Civil Rights

42 § 1985 Conspiracy to interfere with civil rights.

"(2) Obstructing justice; intimidating party, witness, or juror

"If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified.... or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws."

STATEMENT OF THE CASE

This Court is asked to review the decisions made by the

District Court regarding the dismissal of plaintiff Harker's effort to bring a cause of action against the above named defendants under §1983, §1985, §1988 and the First and Fourteenth Amendments to the Constitution.

The plaintiff, Dr. George R. Harker was a twenty-one year tenured professor at Western Illinois University in 1991. He was fired from his University position on June 20, 1991 by the Board of Governors.

The dismissal was based on procedures outline in the contract between the University Professionals of Illinois and the Board of Governors.

The Illinois Educational Labor Relations Board (IELRB) is empowered to review the application of the provisions of the contract and the actions of the union and the university.

The IELRB issued its last order regarding this termination in September of 1996.

Plaintiff Harker found that it made no difference whether the eleven charges brought against him were true or not.

It also made no difference when and how the union represented him. In short the procedural due processes articulated within the procedure did not have to be adhered to in any way. One could argue that procedural due process existed but that substantive due process did not.

It is this lack of due process that plaintiff Harker contends represents the denial of a civil right established by the Fourteenth Amendment to the Constitution.

During the proceedings it became apparent that it was Harker's method and style of teaching Philosophy of Leisure that was one of a number of factors behind the fabricated charges. The department chair and the dean did not appreciate Harker's reliance on Aristotle as the conceptual reference point for the development of the course.

Finally, Harker is a recognized authority in the area of public nudity. He testified in a number of instances in 1989. Harker's testimony in *People v David* (1989) City Court of Rochester (New York) was cited by the New York appellate court in its overturn of

the conviction of nine woman for exposed breasts. Harker alleges obstruction of justice, including retaliation by termination as another element of his suit in District Court. Again the District Court rejected this allegation, trivializing the matter by suggesting that Harker is a proponent of public nudity when he in fact is not.

Many of the charges are derived from miss-statements regarding Harker's absents from campus to testify in various court proceedings or related hearings involving his expertise in public nudity. Harker has been substantially involved in a number of cases, i.e. *People v David* (1989) City Court of Rochester (New York) , *State v. Rowley* (1988) Supreme Court of Hawaii, *Craft v. Hodel* (1988) United States District Court, District of Massachusetts, *The Naturist Society, Inc., and T.A. Wyner v. Fillyaw* (1990) United States District Court, S.D. Florida.

It should be noted that no other tenured professor has ever been fired from Western Illinois University under the application of this procedure.

For the reasons stated above Harker initiated a suit in the District Court alleging discrimination under color of law. The District Court rejected this allegation. "In order to be liable under 42 U.S.C. §1983, a defendant must have acted under color of state law in addition to having violated a constitutional right." (page 7, Order) "The plaintiff cannot sue a private labor union, its attorney and officers, or individuals... without specifying the nature of the alleged state action. The mere fact that certain proceedings are governed by state law does not necessarily render the proceedings actionable under §1983."(Page 8 Order.) "The plaintiff cannot resuscitate his claims simply by crying conspiracy or by noting that the organization is governed by state labor law. The Plaintiff has failed to articulate a colorable cause of action under §1983." (page 9, Order.) "In sum, it is plain that the plaintiff could not prove a set of facts which would entitle him to relief in federal court, ..." (page 10, Order).

Plaintiff Harker believes the facts and the legal conclusions based on those facts support a claim under §1983, §1985 and §1988, concept of discrimination under color of law. If that is the case then it is appropriate that it be heard in the District Court under the

power and authority vested in: § 1343. Civil rights and elective franchise.

Whether plaintiff Harker has a civil rights case is the focal point of this matter. A deprivation of procedural due process is an independent constitutional tort, actionable under this section governing civil actions.

SUMMARY OF ARGUMENT

The plaintiff is asserting that he has been discriminated against under color of law. Specifically he is asserting that he was deprived of his Fourteenth Amendment right to substantive due process before, during, and after the termination proceedings from Western Illinois University.

The District Court rejects plaintiff's assertion in its entirety and thus contends that since no civil rights action exists the court does not have jurisdiction. The following material suggest why the court is in error, "In combination with due process clause of Fourteenth Amendment § 1983 allows plaintiffs to assert three kinds of federal claims, claims for deprivation by state officials of specific protections defined in bill of rights, claims under substantive component of due process clause relating to arbitrary wrongful government action actions, and claims under procedural component of due process clause relating to deprivations of life, liberty, or property without due process of law. *Hodge v. Carroll County Dept. of Social Services*, D.Md. 1992, 812 F. Supp. 593."

"To State claim for relief under this section, plaintiff need only allege that defendant deprived her, under color of state law, of right secured by constitution and laws of the United States, and claim that plaintiff was deprived of her liberty interest under due process Clause of U.S.C.A. Const. Amend. 14 was sufficient as source for court's jurisdiction under this section. *Flowers v. Webb*, D.C.N.Y. 1983, 575 F. Supp. 1450."

42 § 1983 note 1090 Procedural due process "A deprivation of procedural due process is an independent constitutional tort, actionable under this section governing civil action for deprivation of rights with or without proof of actual injury. *Burt v. Abe*.

C.A.4(S.C.)1978, 585 F.2d 613 on remand 466 F. Supp. 1234."

42 § 1983 note 1091 Substantive due process "A plaintiff states a claim for substantive due process violation by alleging that state has violated an independent substantive right, and it is clear that right is violated no matter what process precedes, accompanies, or follows the unconstitutional actions. *Casines v. Murchek*, C.A.11 (Fla.) 1985, 766 F .2d 1494, rehearing denied 773 F.2d 1239."

Plaintiff believes and is trying to clearly assert that he was deprived of substantive due process during his termination from Western Illinois University. In support of this contention plaintiff notes that it made no difference that all of the eleven charges against him could be shown to be false. Plaintiff Harker was not able to call his witnesses, he was not able to complete his testimony, he was not allowed to process a grievance in a matter consistent with the contract, etc.

The above case law clearly demonstrates this should be actionable and that the District Court has jurisdiction.

ARGUMENT

The main issue is jurisdictional. Does plaintiff Harker have a case that falls under the purview of the U.S. District Court?

Issue: Jurisdiction

Harker asserts that he was deprived of his First and Fourteenth Amendment rights by the actions of the defendants under the color of law (the rules and regulations governing the university.)

The District Court rejected this allegation. "In order to be liable under 42 U.S.C. §1983, a defendant must have acted under color of state law in addition to having violated a constitutional right." page 7 Order

Under the cover of various state regulations which govern the procedures for terminating a tenured professor the defendants effectively deprived Harker of his Fourteenth Amendment rights to due process. Under the procedures promulgated between the university and the union it made no difference whether the eleven charges filed against Harker were true or false. As long as the union and the university would agree they could follow whatever procedure

they choose.

It can be demonstrated that there were at least two ways in which substantive due process was negated. First the procedures as stated within the contract regarding the termination procedure and the grievance procedure were not followed by either side. Second it can be demonstrated that under some circumstances a following of the specified procedures may allow relevant information to be kept from review. The union and the university could essentially do what ever they choose in processing the grievance even if it was at the expense of the plaintiff Dr. Harker.

Harker is asserting that the union could agree to do what ever it wanted under the terms of the Illinois Educational Labor Relations Act and still be in compliance with "its duty to represent." Because of this the union and the university agreed to a procedure that effectively eliminated the due process protections required by the Fourteenth Amendment. It is the deprivation of a constitutional right and the conspiracy to deprive Harker of that right that is the basis for this action. See paragraphs 42-47 in original complaint. Paragraph 46 reads as follows: "Utilizing a variety of strategies the IELRB assured that the plaintiff's right to due process would be substantially and ultimately totally impaired. The nature of the IELRB procedure is such that the union and the university can do virtually whatever they agree to." In this case procedural due process and substantive due process were eliminated by mutual agreement of the parties charged in this suit.

42 § 1983 note 1089 Due process clause generally "Lack of ascertainable standards is violation of due process actionable under this section. *Barnes v. Merritt*, C.A. 5 (Ga.) 1967, 376 F.2d 8." If a published procedure is not followed and it makes no difference, can it be said that the true standard is ascertainable? Plaintiff thinks not.

"In combination with due process clause of Fourteenth Amendment § 1983 allows plaintiffs to assert three kinds of federal claims, claims for deprivation by state officials of specific protections defined in bill of rights, claims under substantive component of due process clause relating to arbitrary wrongful government action actions, and claims under procedural component of due process

clause relating to deprivations of life, liberty, or property without due process of law. *Hodge v. Carroll County Dept. of Social Services*, D.Md. 1992, 812 F. Supp. 593." Plaintiff is asserting his claim under "procedural component of due process clause relating to deprivations of life, liberty, or property without due process of law."

"To State claim for relief under this section, plaintiff need only allege that defendant deprived her, under color of state law, of right secured by constitution and laws of the United States, and claim that plaintiff was deprived of her liberty interest under due process Clause of U.S.C.A. Const. Amend. 14 was sufficient as source for court's jurisdiction under this section. *Flowers v. Webb*, D.C.N.Y. 1983, 575 F. Supp. 1450." Plaintiff Harker alleges that defendants deprived him, under color of state law, of right secured by constitution and laws of the U.S. and claims that plaintiff was deprived of his liberty interest under due process Clause of U.S.C.A.

42 § 1983 note 1090 Procedural due process "A deprivation of procedural due process is an independent constitutional tort, actionable under this section governing civil action for deprivation of rights with or without proof of actual injury. *Burt v. Abe*. C.A.4(S.C.)1978, 585 F.2d 613 on remand 466 F. Supp. 1234." Plaintiff Harker asserts that it cannot be any clearer than this. Clearly Harker's allegation of a deprivation of procedural due process is actionable under 42 § 1983.

42 § 1983 note 1091 Substantive due process "A plaintiff states a claim for substantive due process violation by alleging that state has violated an independent substantive right, and it is clear that right is violated no matter what process precedes, accompanies, or follows the unconstitutional actions. *Casines v. Murchek*, C.A.11 (Fla.) 1985, 766 F .2d 1494, rehearing denied 773 F.2d 1239. "

A number of substantive transgressions of due process occurred. Some during the termination hearing. Some during the arbitration proceedings. As but one example the arrangement between the university and the union is such that the arbitrator was even obligated to accept the charges as presented as true. There was no opportunity to present material that would refute that assertion. Therefore no substantive due process existed in what should have

constituted the appeal procedure.

The Illinois Educational Labor Relations Board in following its mandate under law could do nothing other than accept the procedure undertaken by the union and the university. The fact that none of the charges were valid or that information existed demonstrating this fact made no difference in the administrative appeal process. The IELRB could essentially only react to the concept of an unfair labor practice. Whether due process occurred on not was not a consideration in their adjudication of such a charge.

The District Court duly noted the various efforts by the plaintiff to seek relief from various agencies including the Illinois Educational Labor Relations Board but fails to note that efforts are futile because the agency cannot look at the underlying facts of the discharge.

It also became rather apparent throughout the process that plaintiff Harker's first amendment rights to free speech was being curtailed. Many of the fabricated charges were structured around his approach to teaching and also to his appearances in court with regard to being an expert on public nudity.

The procedures promulgated by the university are derived from state laws. They represent a manifestation of the states efforts to proscribe procedures which speak to the concept of due process and other issues associated with the Fourteenth Amendment. The rules and procedures followed in this termination appeared to grant plaintiff Harker due process. However on closer examination it becomes apparent that the procedures as administered by the university in collaboration with the union and under the auspices of the Illinois Educational Labor Relations Board actually deprive plaintiff Harker of his constitutionally provided rights rather than assuring them.

It is this deprivation of substantive due process that is the constitutional right deprived of plaintiff Harker by the actions of the above named defendants in this case.

Issue: Proper Service

"First, the plaintiff has failed to serve the defendants properly.

Rules 4(c) and (e) of the Federal Rules of Civil Procedure dictate the requirements for service of the summons and complaint. Service by certified mail is not permissible." page 5 Order.

This position by the District Court seems to be indicative of the court's attitude toward the pro se litigant. Pro se plaintiff Harker was totally unfamiliar with the procedures of bringing a matter before the District Court. He knew he didn't know the procedures therefore he sought assistance from the Clerk of the District Court. He followed the procedures explained to him by the Clerk. Now the District Court says those procedures are not correct.

Plaintiff Harker followed the procedures which the Clerk of the District Court advised, namely sending the summons (bearing seal of court) by certified mail, return receipt requested. A copy of the original summons along with the returned signed receipt is on file with the court.

According to the Federal Rules of Civil Procedure "The court will only dismiss when the failure of process or service prejudices the defendant." See *Oltremari v. Kansas Social & Rehabilitative Serv.*, 871 F.Supp. 1331, 1349 (D.Kan.1994) noting that Rule 12(b)(4) motion should be granted only when the defect in process prejudices the defendant); *Curcuruto v. Cheshire*, 864 F. Supp. 1410, 1411 (S.D. Ga 1994) noting the Rule 12(b)(5) dismissal is not appropriate absent serious prejudice to opponent or lack of reasonably conceivable means of acquiring jurisdiction over defendant remains); *FDIC v Swager*, 773 F. Supp. 1244 (D.Minn. 1991)(noting that technical defects in form of process will only justify a dismissal upon a showing of actual prejudice).

Harker followed the procedure advised by the Clerk of the District Court. Harker does not understand how the procedures suggested by the court could be considered to be less than that required by Rule 4. And if it was then the rulings cited above should apply and the motion to dismiss should be disallowed.

Issue: Union State Actor

Because the District Court dismissed the allegation that a civil rights issue existed it dismissed the union and its representatives from

those that could be appropriately sued. "The plaintiff cannot sue a private labor union, its attorney and officers, or individuals... without specifying the nature of the alleged state action. The mere fact that certain proceedings are governed by state law does not necessarily render the proceedings actionable under § 1983,"(Page 8 Order.) What the court does not note is that if one has an action under § 1983 then for purposes of the act the union and private individuals can be considered state actors. "Whether certain conduct is "under color of state law" or "state action," for purposes of § 1983 and Fourteenth amendment, is a question of federal, not state law. *Gorenc v. Salt River Project Agr. Imp. and Power Dist.*, C.A.9 (Ariz.) 1989, 869 F.2d 503, certiorari denied 110 S. Ct. 256, 493 U.S. 899, 107 L.Ed.2nd 205."

"State's determination that an association is a private association for purposes of state law does not limit federal courts in determining whether association has acted under color of state law and violated U.S.C.A. Const. Amend. 14. *Robinson v. Wichita Falls & North Texas Community Action Corp.*, C.A. 5 (Tex.) 1975, 507 F.2d 245."

These defendants are state actors by virtue of their symbiotic relationship with the university. "U.S. Code 42 § 1983 note 574 Symbiotic relationship with state-Generally"

"Private action is transformed into "state action" for purposes of § 1983 under symbiotic relationship test when state has so far insinuated itself into position of interdependence with private party that it must be recognized as joint participant in challenged activity; in sum, symbiotic relationship test seeks to establish whether overall interest of government and private actor overlapped to such extent as to virtually coincide. *Chan v. City of New York*, S.D.N.Y. 1992 803 F. Supp. 710, affirmed 1 F.3d 96, certiorari denied 114 S.Ct. 472, 126 L.Ed.2d 423."

"U.S. Code 42 § 1983 note 581 Knowledge or willfulness To act under color of state law for purposes of this section does not require that the defendant be an officer of the state; it is enough that he is a willful participant in joint action with the state or its agents; private persons, jointly engaged with state officials in the challenged

action, are acting under color of law for purposes of this section. *Dennis v. Sparks*, 1980, 101 W.Ct. 183, 449 U.S. 24, 66 L.Ed.2d 185." It is clear all the individuals named will fall under this categorization.

"Private parties act under color of state law, for purposes of § 1983 liability, if they willfully participate in joint action with state official to deprive others of constitutional rights. *United Steelworkers of America v. Phelps Dodge Corp.*, C.A.9 (Ariz.) 1989, 865 F.2d 1539, certiorari denied 110 S.Ct.51, 493 U.S. 809, 107 L.Ed.2d 20, on subsequent appeal 896 F.2d 403."

"US. Code 42 § 1983 note 1028 Unions" "While union was private entity and board of education, in with holding "agency fee" from its employees' wages, was acting as union's agent, when public employer assists union in coercing public employees to finance political activities, that is state action; and when private entity such as union acts in concert with public agency to deprive people of their fundamental constitutional rights, it is liable under this section along with agency. *Hudson v. Chicago Teachers Union Local No 1*, C.A.Ill.1984, 743 F.2d 1187, affirmed 106 S. Ct. 1066,475 U.S. 292, 89 L.Ed.2d 232, on remand 117 F.R.D. 413."

The fundamental constitutional issue is of course substantive due process associated with the Fourteenth Amendment as earlier presented under jurisdiction.

Issue: Statutes of Limitations

"To the extent that this lawsuit concerns the plaintiff's discharge from Western Illinois University, the complaint is time-barred." Page 5 the Order.

The plaintiff's allegation is that his civil rights were violated in that the dismissal process curtailed his fourteenth amendment rights of due process. The deprivation of those rights occurred prior to the discharge, during the discharge and in the proceedings that took place after the discharge.

Obviously plaintiff Harker believed that mechanism existed within the provisions of the contractual arrangement between the university and the union to deal with those perceived problems of due process. He also thought that administrative remedies were

available through the Illinois Educational Labor Relations Board. Only after receiving the final decision of the IELRB in September of 1996 could it be determined that the alleged violations of Harker's civil rights would go unchallenged. It seems clear from case law that such administrative remedies must be completed before going into Federal Court.

Plaintiff pursued the administrative remedies that were available to him, i.e. processing various complaints with the union and the IELRB. The latest complaint filed in 1995 with a decision rendered in January of 1996. This was appealed and apparently a decision was rendered in September of 1996 although a copy of this decision was never presented to the Plaintiff.

Case law suggest that one must pursue administrative remedies if available. "Plaintiff with a claim for relief under this section is not required to exhaust state judicial remedies but must exhaust state administrative remedies. *James v. Board of Ed. of Central Dist. No. 1 of Towns of Addison et al.*, C.A. 2 (N.Y.) 1972, 461 F.2d 566 certiorari denied 93 S. Ct.529, 409 U.S. 1042, 34 L.Ed.2d 491 rehearing denied 93 S.Ct. 1355, 410 U.S. 947, 35 L.Ed.2d 617, on remand 385 F.Supp.209." That is why plaintiff Harker waited until he did.

"Where constitutional claims are brought under this section, there is a general requirement of exhaustion of administrative remedies. *Kinzli v. City of Santa Cruz*, D.C.Cal 1982. 539 F. Supp. 887."

"While time limitation in a civil rights unit is borrowed from state law, the federal rule fixes the time of accrual that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action. *Bireline v. Seagondollar*, C.A.4(N.C.) 1977, 567 F.2d 260, certiorari denied 100 S.Ct.83, 444 U.S. 842, 62 L.Ed.2d 54."

For years Plaintiff Harker believed that the procedures in place regarding the termination of a tenured professor were such that he would get due process. It was only after personally experiencing the deception of the various agencies named in this suit as defendants that Harker realized he was being deprived of his right to substantive

due process. More importantly perhaps, it was only on researching the law that Harker became aware that a mechanism existed to seek redress for the deprivation of those rights. This suit is a product of that belief and falls well within a two year time limit based on when he became aware of the potential implications of this course of action.

Issue: Attorney Conflict of Interest

Attorney Conflict of Interest. The District Court rejected the notion that the attorney representing the union and another attorney named in the suit represented a conflict of interest.

"... motion to disqualify Elizabeth Joffe and the firm Cornfield and Feldman from representing any defendant." (page 2, Order).

"The court is unpersuaded that the plaintiff had an attorney-client relationship with the law firm of Cornfield and Feldman." (page 2, Order).

During the above described action various attorneys with the firm of Cornfield and Feldman represented Harker in the litigation. The specific attorneys involved included Stephen Yokich and Barbara Hillman.

It is clear that one or more of the following Illinois Supreme Court Rules are applicable in this situation.

"Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably relieves the representation will not adversely affect the relationship with the other client; and (2) each client consents after disclosure."

"Rule 1.9 CONFLICT OF INTEREST: FORMER CLIENT (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the former client consents after disclosure."

"Rule 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE (a) No lawyer associated with a firm shall represent a client

when the lawyer knows or reasonably should know that another lawyer associated with that firm would be prohibited from doing so by Rules 1.7, 1.8(c) or 1.9 except as permitted by Rules 1.10(b), (c), or (d), or by Rule 1.11 or Rule 1.12."

It is clear that the court tends to interpret the application of these regulations in a manner that favors disqualification if there is even an appearance of a conflict of interest. The facts of this situation clearly support disqualification in this instance.

"C.A.7(Ill.)1978 To warrant disqualification on basis of relationship between matters presented by pending litigation and matters which lawyers in question worked on in behalf of former client, evidence need only establish scope of legal representation, rather than actual receipt of allegedly relevant confidential information, and any doubts as to existence of asserted conflict of interest should be resolved in favor of disqualification ABA Code of Professional Responsibility, Canons 4,9. (*Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221)"

"Bkrtcy.D.Il.1983 Doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification. (*Matter of Whitney-Forbes,Inc.*, 31 B.R. 836)"

"Ill.App. 1 Dist. 1993 Attorney's violation of conflict-of-interest rules gives rise to high probability that trial may be tainted, and any doubts as to existence of conflict should be resolved in favor of disqualification. Code of Prof. Resp., Canons 4,5.Ill.Rev.Stat.1987,ch. 110A, foll 774. (*SK Handtool Corp. v. Dresser Industries, Inc.* 189 Ill.Dec 233,619 N.E.2d 1282, 246 Ill.app.3d 979)"

"C.A.Fed.(Ill.)1984 Under Seventh Circuit law, proof by party moving for disqualification of an attorney of a "substantial relationship" between past work and the suit at hand gives rise to a presumption that the attorney who actually did the past work received confidences relevant to the present litigation. ABA Code of Prof.Resp.,Canons 4,9. (*Panduit Corp. v. All States Plastic Mfg. Co.,Inc., Co., Inc.*, 744 F.2d 1564)"

"N.D.Ill. 1983 Conflict of interest provisions of Code of Professional Responsibility preserve integrity and favorable public image of both legal profession and judicial system by prohibiting even

the appearance of professional impropriety. ABA Code of Prof.Resp., Canon 9. (*Hughes v. Paine, Webber, Jackson & Curtis Inc.*, 565 F.Supp. 663)"

The courts have held that knowledge and actions of any partner in a law firm are imputed to every other partner for purposes of motion to disqualify lawyer for conflict of interest. For this reason any attorney associated with the firm of Cornfield and Feldman should be barred from an appearance in this action.

"N.D.Ill.1980 Knowledge and actions of any partner in a law firm are imputed to every other partner for purposes of motion to disqualify lawyer for conflict of interest; it is considered to be contrary to public policy to inquire as to whether communications regarding client confidences and secrets in fact took place. (*Hampton v. Hanrahan*, 499 F.Supp. 640, appeal dismissed 643 F.2d478)"

Under Illinois law even the mere appearance of a conflict of interest is enough to require withdrawal from a case.

"C.D.Ill.1991 Under Illinois law, attorney may be required to withdraw based on mere appearance of conflict of interest. Ill.Rules of Prof.Conduct, Rule 3.7,S.H.A. ch. 110A, Foll 777. (*Greater Rockford Energy and Technology Corp. v. Shell Oil Co.*, 777F.Supp. 690)"

It is clear that agents of the firm of Cornfield and Feldman are a party to the conspiracy to deprive plaintiff Harker of his constitutionally provided right of substantive due process. It seems to plaintiff Harker that Illinois Supreme Court Rules make it clear that the firm of Cornfield and Feldman should not be representing any defendants in this matter. In fact I believe a case could be made that the firm itself should be named as a defendant in this suit.

Issue: Res Judicata

The District Court suggest that various issues could have been dealt with in the administrative review by the Illinois Educational Labor Relations Board (IELRB) and thus would be considered *res judicata*. "The Supreme Court has held that agency adjudication of a factual matter can be *res judicata* in later proceedings." (page 7, Order.)

Plaintiff Harker asserts that the failure of the administrative review process to review any of the issues associated with due process and other constitutional rights is the crux of the problem and why this matter must be heard in a Federal court.

The issue is whether Harker was afforded due process by the mechanism in place to monitor the procedures used in his termination. That a procedure that was significantly flawed with regard substantive due process can be accepted *res judicata* in later proceedings suggests an inherent disregard for the constitutional rights of the Fourteenth Amendment. The issue again is whether plaintiff Harker received substantive due process.

It is the procedure of the IELRB that is being called into question in the action against the IELRB. The nature and construction of the procedure itself is the basis for the cause of action in this case.

In other words it is the plaintiff's assertion that he was deprived of his first and fourteenth amendment rights by a state regulation/procedure that precludes substantive and procedural due process as well as first amendment rights. The procedure of the IELRB essentially says that any procedure agreed to by the union and the university is all right and can not be challenged.

Further the Board asserts that a complaint must be filed within sixty days of an incident. Thus when the union and the university would delay their action past sixty days the window for exercising ones rights would close.

Furthermore the IELRB would not make its decision on a complaint known for periods of time ranging from six to eight months after the filing of the complaint. This would then further preclude an individual challenging an incident where the problem with the filing may have merely involved properly stating the issue. Of course as previously mentioned it would not matter if the issue was clearly stated for the IELRB would acquiesce to the position that what ever the university and the union agreed was all right.

It is the deprivation of civil rights under the color of law (the law referred to above) that is one of the central issue of this suit. The IELRB was not about to make an assessment of the legitimacy of its

own regulations. It was either unable or unwilling to address the question of substantive due process. Instead it became a collaborator in the conspiracy to deprive Harker of his constitutional right to substantive due process.

Issue: Barred by the Eleventh Amendment

"As the court also advised the plaintiff in his previous lawsuit, any claims against Western Illinois University and the Illinois Educational Labor Relations Board are barred by the Eleventh Amendment. The Eleventh Amendment bars an action for damages in federal court against the state and state agencies." (page 10 Order)

The Court must recognize that the Eleventh Amendment does not bar suit against a state official in his or her official capacity for prospective relief, whether injunctive or declaratory in nature, where the Plaintiff alleges that the official has violated either federal law or the United States Constitution. *Ex parte* Young, 28, S. Ct. 441 (11980). *Watkins v. Beinziger*, 789 F. 2d 474 (7th Cir 1986).

Harker's complaint clearly states that the Defendant Board of Trustees is named as a Defendant for injunctive relief only. (See caption of Complaint). The Board of Trustees of the University of Illinois is the proper party to be named when suing the University of Illinois. 110 ILCS 690/40.

Further, Harker is suing the Board of Trustees collectively in their official capacity. In *Lee v. Board of Regents of State College*, 441 F.2d 1257, 1260 (7th Cir. 1971), the Board of Regents of a State University argued that declaratory relief against them was barred by the Eleventh Amendment. The Seventh Circuit noted that officials may be enjoined from violating constitutional rights, despite the Eleventh Amendment. Therefore, "the fact that the board is a body corporate did not change the application of *Ex Parte* Young and the Board would be considered a person for such relief. See also, *U.S. v. Olavarrieta*, 632 F. Supp. 895 (S.D. Fla. 1986) (Eleventh Amendment did not protect Board of Regents since it was the Board and not the University that was sued.)

Another citation supporting such a position is 42 § 1983 Note 285 "Trustees and administrators of state university, in their official

capacities, were "person" against whom action could be brought under this section *Gay Students Organization of University of New Hampshire v. Bonner*, C.A.1 (N.H.) 1974, 509 F.2d 652."

The same argument and rational is applicable to Harker suing the Illinois Educational Labor Relations Board. (See caption of Complaint). Harker is suing the IELRB collectively in their official capacity. Note 210 "Governmental entities are "persons" for purposes of civil rights statute. *Fleming v. Department of Public safety*, com. of Northern Mariana Islands, C.A.9 (N. Mariana Islands)1988.837 F.2d 401, certiorari denied 109 S. Ct. 222, 488 U.S. 889, 102 L. Ed. 2d 212." also "Governmental units may be "persons" within meaning of this section. *Kurek v. Pleasure Driveway and Park Dist. of Peoria*, C.A.7(Ill) 1978,583 f.2d378, certiorari denied 109 S.Ct. 873, 439 U.S. 1090, 59 L.Ed.2d 57."

Still another citation supporting the legitimacy of this action: Note 446 "Supreme Court holding, that state or state official were not considered "persons" under §1983, does not apply when state official in his or her official capacity is sued for prospective relief. *Chaloux v. Killeen*, C.A.9 (Idaho) 1989,886 F.2d 247."

Harker has properly identified the parties to be sued and clearly such a suit is not barred by the Eleventh Amendment.

Issue: Public Interest

Being a teacher in a public institution of higher learning brings with it certain responsibilities and obligations. One of which is to share the expertise of that individual with others for the benefit of the public good, i.e. knowledge of public nudity laws and their application to the woman's rights issue. Harker is not an advocate of public nudity, rather he is an authority on the issue. By virtue of the clear trends within this area it is obvious why he is sought out by the advocates of public nudity and women's rights. Opponents of Dr. Harker's point of view effectively used the provisions of the university contract to stifle his voice in such matters. A clear and intentional violation of Harker's constitutional rights of association and free speech.

Issue, does Harker have a right to appear in court and offer

his expert opinion without retribution from the university? The plaintiff believes he has identified a very significant flaw in the process that is supposed to protect tenured university professors from dismissal over their knowledge of material that other segments of society do not wish disseminated.

Plaintiff Harker is going up against the "system" as a pro se litigant. There is a public interest in the idea that an educator like Harker be given the opportunity to be heard in court. If someone with the credentials of plaintiff Harker can be shut out of the judicial system when he alleges his constitutional rights are violated, what does this mean for the common man? It tends to make a mockery of the judicial system and its role in preserving our free society.

Pro se Complains

"Note 44. Pro se complaints Pro se complaints must be held to a less stringent standard than formal pleadings drafted by attorneys. *Bach v. Scott*, D.C.Ill. 1973, 357 F. Supp. 1125."

"Courts should endeavor to construe pro se complaints for protection of civil rights with utmost liberality and without regard to technicalities, but rules do not require an unreasonable construction or gross assumptions *Mahurin v. Moss*. D.C. Mo1970, 313 F. Supp. 1263."

"Where plaintiffs appeared pro se and raised claim under this subchapter, the court gave a liberal reading to the amended complaint. *Stambler v. Dillon*. D.C.N.Y.1969, 302 F. Supp. 1250"

"In sum, it is plain that the plaintiff could not prove a set of facts which would entitle him to relief in federal court, ..." (page 10, Order). Clearly the District Judge does not wish to see the allegations by the pro se litigant in a light that is favorable to the pro se litigant. Under such an approach there is no way the pro se litigant can prevail. However it is more than clear from the case law cited above that this is not the procedure that should be followed by the court. "Under the Federal rules of Civil Procedure, it is well established that, on a motion to dismiss, a complaint must be construed in the light most favorable to the plaintiff, the allegations thereof taken as true; and if it appears reasonably conceivable that at trial the plaintiff can establish a set of facts entitling him to some relief, the complaint

should not be dismissed." *Mathers Fund, Ic. v. Colwell*, 564 F.2d 780, 783 (7th Cir. 1977).

The Court should not dismiss Harker's Complaint for failure to state a claim unless it finds that Harker can prove no set of facts in support of his claims that would entitle him to the relief requested. *Augustine v. Edgar*, 576. Supp. 1141, 1143 (N.D. Ill. 1983).

It is clear that the position contrary to that taken by Judge Mihm is the one favorable to the pro se litigant. An alleged violation of civil rights under color of law would necessitate that the matter be heard in the District Court.

CONCLUSION

The materials cited above can lead to only one conclusion. Plaintiff Harker has outlined a cause of action involving the deprivation, under color of state law, of rights secured by the constitution and laws of the United States. Case law clearly demonstrates that he has met the criteria necessary for this matter to be heard in the District Court. Indeed the nature of his allegations are such that there is no other forum where it can or should be heard.

The issues are so deeply entwined with the concept of academic freedom and the public good that to preclude a hearing on this matter would deeply and profoundly impact the fundamental premises of higher education. The idea that individuals must open their minds to new and different ideas without fear of retribution. It is the job of educators and education to facilitate that dialogue.

This case must be returned to the District Court. To do otherwise deprives the plaintiff of the very essence of what the constitution of this country is supposed to stand for and protect.

George R. Harker

APPENDIX D INITIAL SUIT

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

Dr. George R. Harker	)	
	)	
Plaintiff	)	No. 97-
	)	
v.	)	Jury Trial Demanded
	)	Equitable Relief Sought
	)	
WESTERN ILLINOIS UNIVERSITY, et. al)		
	)	
Defendants	)	

UNIVERSITY PROFESSIONALS OF ILLINOIS,
ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD
Ralph Wagoner, Donald S. Spencer, Burton Witthuhn, Gordon Kirk, Eric Stiffler, Bernard N. DiGrino, Gilbert A. Belles, Charles Spencer, Mark Dunn, John Maguire,
Maurine Magliocco, Mitchell Vogel, Richard Brewer, Robert Holton, Barbara Hillman, Thomas Layzell, and Michael Provines

COMPLAINT

NOW COMES Plaintiff, George R. Harker, pro se and for his Complaint, states as follows:

JURISDICTION AND VENUE

1. This action is brought pursuant to 42 U.S.C. §1983, §1985, §1988 and the First and Fourteenth Amendments of the United States Constitution Jurisdiction is founded upon 28 U.S.C. § 1331 and

§1343 (1)(2)(3)(4), and the aforementioned statutory and constitutional provisions.

2. Venue is proper under 28 U.S.C. §1391(b).

3. This Court has jurisdiction of Count III pursuant to its "supplementary jurisdiction" under 28 U.S.C. §1367.

THE PARTIES

4. Plaintiff, Dr. George R. Harker, (hereinafter called "Harker") is a citizen of the United States and the State of Illinois and resided in the Central District until late 1996. (He now resides in Hawaii.) He was employed by Western Illinois University as a tenured professor for 21 years.

5. Defendant, Board of Trustees of Western Illinois University, (hereinafter called "BOARD"), is the governing body of Western Illinois University.

6. Defendant, University Professionals of Illinois, (hereinafter called "UNION"), the collective bargaining unit of Western Illinois University.

7. Defendant, Illinois Educational Labor Relations Board, (hereinafter called "IELRB"),160 N. LaSalle Street, Suite N-300, Chicago, IL 60601-3103 (or 320 West Washington, 2nd Floor, Springfield, Illinois 62701-1135) is a state entity charged with administering the Illinois Education Labor Relations Act. (Julie Huges, General Counsel)

8. Defendant, Ralph Wagoner, (hereinafter called "Wagoner"), is a former President of Western Illinois University. He is sued individually.

9. Defendant, Donald S. Spencer, (hereinafter called "D. Spencer"), is the President of Western Illinois University. He is sued individually.

10. Defendant, Burton Witthuhn, (hereinafter called "Witthuhn"), is the Provost and Academic Vice-President Western Illinois University. He is sued individually.

11. Defendant, Gordon Kirk, (hereinafter called "Kirk"), is a former Assistant Provost of Western Illinois University. He is sued individually.

12. Defendant, Eric Stiffler, (hereinafter called "Stiffler"), is the Assistant Provost of Western Illinois University. He is sued individually.

13. Defendant, Bernard N. DiGrino, (hereinafter called "DiGrino") is the Department Chairperson, Department of Recreation and Park Administration at Western Illinois University. He is sued individually.

14. Defendant, Gilbert A. Belles, (hereinafter called "Belles"), faculty member Western Illinois University. He is sued individually.

15. Defendant, Charles Spencer, (hereinafter called "C. Spencer"), is a former Dean, Western Illinois University. He is sued individually.

16. Defendant, Mark Dunn, (hereinafter called "Dunn"), is an Attorney for the Board of Governors. He is sued individually.

17. Defendant, John Maguire, (hereinafter called "Maguire"), is a Vice President of Western Illinois University. He is sued individually.

18. Defendant, Maurine Magliocco, (hereinafter called "Magliocco"), is the President of the Union/Faculty Member Western Illinois University. She is sued individually.

19. Defendant, Mitchell Vogel, (hereinafter called "Vogel"), is the President of University Professionals of Illinois, local 4300, the Union. He is sued individually.

20. Defendant, Richard Brewer, (hereinafter called "Brewer"), is the Grievance Officer, University Professionals of Illinois, local 4300, the Union. He is sued individually.

21. Defendant, Robert Holton, (hereinafter called "Holton") is a faculty member of WIU, officer of University Professionals of Illinois, local 4300, the Union. He is sued individually.

22. Defendant, Barbara Hillman, (hereinafter called "Hillman"). An attorney for University Professionals of Illinois. She is sued individually.

23. Defendant, Thomas Layzell, (hereinafter called "Layzell"), Chancellor, Board of Governors of State Colleges and Universities. He is sued individually.

24. Defendant, Michael Provines, (hereinafter called

"Provines"), Officer, Board of Governors. He is sued individually.

COUNT I

FIRST AND FOURTEENTH AMENDMENT CLAIM AGAINST THE BOARD OF TRUSTEES OF WESTERN ILLINOIS UNIVERSITY (INJUNCTIVE RELIEF ONLY), UNIVERSITY PROFESSIONALS OF ILLINOIS, ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD (INJUNCTIVE RELIEF ONLY), Ralph Wagoner, Donald S. Spencer, Burton Witthuhn, Gordon Kirk, Eric Stiffler, Bernard N. DiGrino, Gil Belles, Charles Spencer, Mark Dunn, John Maguire, Maurine Magliocco, Mitchell Vogel, Richard Brewer, Robert Holton, Barbara Hillman, Thomas Layzell, Michael Provines,

The context of this complaint and the framework in which it was accomplished is as follows:

25. Plaintiff was a twenty-one year tenured professor at Western Illinois University in the Department of Recreation and Park Administration.

26. It will be asserted that Dr. Harker was fired under the provisions of the contract between WIU and UPI for adequate cause.

27. The Plaintiff asserts that in reality he was fired for the nature of his course content and teaching style.

28. The Plaintiff also asserts that he was also fired because of his involvement as an authority and expert witness in the area of public nudity.

29. Plaintiff Harker has testified or been directly involved in a number of cases involving public nudity within a public recreational context.

30. Plaintiff Harker testified in Hawaii in November of 1989.

31. Defendants Dunn, DiGrino, Kirk, and others interfered with this appearance and misrepresented this professional involvement to the termination hearing committee.

32. Additionally plaintiff Harker was subpoenaed to testify in a federal case involving T.A. Wyner in Florida, also in November of 1989.

33. Defendants Kirk and Witthuhn prevented Harker from appearing in court.

34. Plaintiff Harker was summoned to testify in Rochester, New York in October 1989.

35. Defendant DiGrino forced Harker to reschedule his testimony in that trial.

36. Plaintiff Harker wrote a book entitled "The Creation and Management of Clothing Optional Beaches and Parks" published in October of 1990. Defendants DiGrino, Wagoner and others prevented Harker from attending the release of this book at the annual conference of the National Recreation and Parks Association.

37. The above named defendants went to rather elaborate lengths to suggest that the plaintiff's dismissal was based on the provisions of the contract which require adequate cause be shown.

38. The named defendants under the color of law were able to deprive plaintiff Harker of a fair and complete hearing.

39. The defendants by utilizing the contractually provided procedure were able to circumvent the procedures intended to establish due process and collaborated with one another to assure that plaintiff Harker was fired and deprived of his university position.

40. He was fired from his position by the Board of Governors on June 21, 1991 supposedly under the provisions of the contract between the University Professionals of Illinois (the Union) and the Board of Governors of Western Illinois University.

41. At the time of the firing it appeared that there were provisions to appeal and address fundamental questions related to due process and the fact that all of the eleven charges presented against the plaintiff could be demonstrated to be untrue.

42. In the appeal process that lasted some five years the university and the union were able to proceed in a manner that precluded any challenge to their handling of the appeal by virtue of provisions within the Illinois Educational Labor Relations Act.

43. The Act provides that one can only file an unfair labor relations charge against the union if their actions constitute intentional misrepresentation in its efforts on behalf of a faculty member.

44. Further the Act provides that the faculty member must file such a complaint within six months of the alleged commitment of that act with the IELRB.

45. During the grievance appeal process, Dr. Harker, the plaintiff filed a number of charges against the university and the union with the IELRB in an effort to get both parties, the Union and the University to follow their own procedures.

46. Utilizing a variety of strategies the IELRB assured that the plaintiff's right to due process would be substantially and ultimately totally impaired. The nature of the IELRB procedure is such that the union and the university can do virtually whatever they agree to.

47. The Union and the University agree to a procedure where Harker did not get a fair hearing because he was not represented by counsel and was not allowed to complete his testimony.

48. In the last action filled against the university and the union with the IELRB, the IELRB has to this day failed to provide the plaintiff with a response to his appeal of a decision made in January 1996.

49. The results of that decision were made known to the Union and the University in September of 1996 but in spite of request by the plaintiff, he has yet to be provided with the documentation.

50. All of the above named parties have participated in this conspiracy to deprive the plaintiff of his constitutional guaranteed civil rights in one way or another. The nature of this participation is briefly outlined in the paragraphs to follow.

51. The above named defendants have conspired to deprive plaintiff of his property and liberty interest in his position as a university professor at Western Illinois University. Under the color of law (provisions of The Illinois Education Labor Relations Act) they have deprived plaintiff of substantive due process, a right guaranteed under the fourteenth amendment. Additionally they have substantially interfered with the plaintiff's first amendment right of academic freedom and free speech, i.e. having the plaintiff removed from his position because of what he was teaching and the way he was teaching it.

52. They have knowingly conspired in various combinations and in various ways and degrees to obstruct justice and deprive plaintiff Harker of his civil rights. i.e. academic freedom and due process. The termination results from their retaliation for conduct protected under the First and Fourteenth Amendments of the United States Constitution.

53. Defendant Ralph Wagoner conspired with Dunn, DiGrino, Witthuhn and other above named defendants to deprive plaintiff Harker of his tenured teaching position. He concocted and prepared documents which he knew to be false and misleading to justify his actions. Then acting under the color of law he obtained the discharge of Harker by the Board of Governor.

54. Defendant Donald S. Spencer conspired with Dunn, Maguire, Stiffler and other above named defendants to assure that Harker's wrongful discharge would not be reversed. He prepared documents that suggested certain documents were provided to the plaintiff and then withheld the documents. He failed to provide any of the documents requested in the grievance process.

55. Defendant Burton Witthuhn conspired with Wagoner, C. Spencer, D. Spencer Dunn, Maguire, DiGrino and others to orchestrate the termination of Harker under the color of law and the contract between Western Illinois University and the University Professionals of Illinois.

56. Defendant Burton Witthuhn was well aware that actions by DiGrino, C. Spencer, Kirk, Belles, and others were interfering with Harker's academic freedom. Nevertheless he assisted in conspiring with the defendants to achieve the ultimate interference with academic freedom, the termination of Dr. Harker.

57. Defendant Gordon Kirk conspired with Wagoner, C. Spencer, D. Spencer, Witthuhn, DiGrino and others to create false and misleading documents and scenario's to create the impression that Harker had repeatedly violated university policy when in fact he had not.

58. Defendant Eric Stiffler conspired with Wagoner, D. Spencer, Layzell, Provines, Dunn and others to deprive Harker of his constitutionally provided rights of due process. He did this by

preventing Harker from having access to documents, calling witnesses, or having representation in a Grievance hearing. Additionally he would not consider evidence in the hearing that demonstrated that none of the eleven charges against Harker were true.

59. Defendant Bernard N. DiGrino conspired with Wagoner, Dunn, Belles, Kirk, C. Spencer and others to deprive Harker of his constitutionally provided rights of due process under the color of law.

60. Additionally DiGrino and others actively interfered with the academic freedom of Harker regarding his method of teaching Philosophy of Leisure and his court related appearances dealing with his area of specialization and expertise, Administration of Public Recreational Nudity.

61. DiGrino also falsified documents and presented false testimony to create scenarios of events designed to suggest that Harker was not properly preforming his duties as a university professor.

62. Defendant Gilbert A. Belles conspired with DiGrino, Kirk, C. Spencer and others to create a scenario of events designed to justify the firing of Harker under the color of state law.

63. Defendant Belles was actively involved with DiGrino and C. Spencer in the direct interference with Dr. Harker's academic freedom and his approach to the teaching of the course Philosophy of Leisure.

64. Defendant Charles Spencer conspired with DiGrino, Kirk, Belles and others to actively interfere with Harker's academic freedom both within and without the classroom. C. Spencer conspired to deprive Harker of his university position under the color of state law through a series of attacks on Harker's teaching, an area protected by first amendment rights of free speech.

65. Defendant Mark Dunn conspired with DiGrino, Kirk, Belles, Wagoner, Witthuhn, Provines and others to deprive Harker of rights protected by the first and fourteenth amendments. Dunn directed and aided the named defendants in a coordinated attack on Harker's teaching and related job duties as a university professor in a manner to assure his dismissal from the university under the color of law.

66. Defendant Dunn presented to the termination hearing committee and others information he knew or should have known was false in his efforts to secure the termination of Harker from his university position.

67. Dunn was well aware that Harker was being deprived of his constitutionally provided rights of due process and academic freedom yet continued to assist in the conspiracy to deprive Harker of his livelihood.

68. Defendant John Maguire conspired with Wagoner, D. Spencer, Witthuhn, Dunn, and others to deprive Harker of his position at Western Illinois University. Maguire withheld documents under the guise of provisions of the Freedom of Information Act that would exonerate Harker of various charges brought against him. Additionally he generated documents which suggested that he had turned over documents as requested which he in fact did not turn over. Additionally he also put information out to the press that he knew to be false and misleading regarding the events surrounding the firing of Dr. Harker from Western Illinois University.

69. Defendant Mitchell Vogel conspired with Wagoner, Witthuhn, Provines, Layzell, Hillman, and others to deprive Harker of his due process rights. Vogel intentionally delayed and failed to respond to request for representation in the termination process. Vogel justified his actions by hiding under the color of law.

70. Defendant Maurine Magliocco conspired with Vogel, Brewer, Holton, and others to deprive Harker of his due process rights. Although repeatedly asked to represent Harker during the action by the university she remained mute.

71. Under the color of law (Illinois Education Relations Act) the named defendants have conspired to deprive plaintiff Harker of his civil rights.

72. As a result of Defendants' actions, Harker has suffered embarrassment, humiliation, physical and emotional pain and suffering, damage to his reputation, lost wages and benefits and other compensatory damages.

73. Defendants' actions were taken with malice and in reckless and wanton disregard of Harker's rights under the First and

Fourteenth Amendments of the United States Constitution.

WHEREFORE, Plaintiff, George R Harker, requests the following relief:

(a) That he be reinstated to the position of Associate Professor.

(b) That he be awarded damages to compensate him for any and all lost wages and other employment benefits, including but not limited to, reinstatement, promotion and any other appropriate relief to which he is entitled.

(c)That he be awarded appropriate compensatory damages to compensate him for all other losses incurred as a result of Defendants' actions.

(d) That he be awarded punitive damages in an appropriate amount.

(e) That he be awarded pre-judgment interest on each of the above damages.

(f) That the Defendants be enjoined from engaging in any continuation of interference with the First Amendment rights of HARKER.

(g) That the Court award HARKER his reasonable attorney' fees, costs and litigation expenses.

(h) That the Court grant such other and further relief as it deems just.

PLAINTIFF, DR. GEORGE R. HARKER DEMANDS A TRIAL BY JURY ON COUNT I.

COUNT II

INTENTIONAL INTERFERENCE WITH EMPLOYMENT RELATIONSHIP. AGAINST DEFENDANTS Ralph Wagoner, Donald S. Spencer, Burton Witthuhn, Gordon Kirk, Eric Stiffler, Bernard N. DiGrino, Gil Belles, Charles Spencer, Mark Dunn, John Maguire, Maurine Magliocco, Mitchell Vogel, Richard Brewer, Robert Holton, Barbara Hillman, Thomas Layzell, Michael Provines

Plaintiff, George R. Harker, realleges paragraph 25 through 73 of Count I.

74. Defendants Ralph Wagoner, Donald S. Spencer, Burton Witthuhn, Gordon Kirk, Eric Stiffler, Bernard N. DiGrino, Gilbert A. Belles, Charles Spencer, Mark Dunn, John Maguire, Maurine Magliocco, Mitchell Vogel, Richard Brewer, Robert Holton, Barbara Hillman, Thomas Layzell, and Michael Provines deliberately, maliciously and without just cause intentionally interfered with Harker's reasonable expectation of employment by causing him to be removed from his position of tenured professor at professor and causing him to be terminated from his employment under color of law utilizing charges which they knew to be false.

75. Defendant Wagoner gave reasons which he knew to be untrue to seek the termination of plaintiff Harker from his tenured position at WIU.

76. Defendant D. Spencer withheld documents and took no action to rectify an action which he had the power to correct when it was called to his attention that plaintiff Harker had been discharged for the nature of his teaching rather than the obviously false charges leveled against him.

77. Defendant Witthuhn actively conspired to implement Harker's termination although he was well aware that no legal basis existed.

78. Defendant Kirk assisted DiGrino, Wagoner, Witthuhn, C. Spencer and others in developing a false set of circumstances on which to seek plaintiff Harker's dismissal from the university.

79. Defendant Stiffler deliberately refused to examine or consider evidence that supported plaintiff's Harker's contention that none of the charges leveled against him in the termination process were true.

80. Defendant DiGrino created false documents, and other materials in his efforts to deprive Harker of his employ with WIU.

81. Defendant Gilbert A. Belles created false and misleading documents regarding the nature and content of plaintiff's course Philosophy of Leisure.

82. Defendant Charles Spencer directly interfered with

plaintiff's teaching methods and course content. When plaintiff Harker resisted these obvious intrusion into his academic freedom, C. Spencer initiated sanctions and other actions that ultimately lead to Harker's dismissal from WIU.

83. Defendant Mark Dunn presented Harker's resistance to obvious intrusions on his academic freedom as unprofessional behavior of a level sufficient to justify being fired. On more than one occasion Dunn misrepresented to the termination hearing committee and other hearing boards information which he knew or should of known was false.

84. Defendant Mark Dunn collaborated with defendant Hillman in withholding materials presented during the grievance hearings from the arbitrator. Information which Dunn knew would exonerate Harker of all charges brought against him.

85. Defendant John Maguire actively blocked access to documents which would have been helpful to the defense of plaintiff Harker. On more than one occasion Maguire actually created documents suggesting that documents requested had been turned over when in point of fact they had not.

86. Defendant Maurine Magliocco failed to represent Harker at any of the hearings where she was asked to appear. She collaborated with defendants Holton, Brewer, Hillman, Vogel and others to assure that Harker would not have fair or competent representation during the termination process.

87. Defendant Mitchell Vogel actively conspired with Hillman, Brewer, and Holton to deprive Harker of a fair hearing by hiding under the color of law. Under the color of law Vogel is not obligated to do anything substantive to be considered representing a union member. Additionally Vogel facilitated time delays that would bar plaintiff Harker from having recourse under the provisions of the Illinois Educational Labor Relations Act.

88. Defendant Richard Brewer conspired with Hillman, Brewer, Holton, Provines, Magliocco and others to deprive Harker of due process. He did this by failing to obtain documents from the university as requested by plaintiff Harker on more than one occasion. He also deliberately created time delays within the process

which blocked recourse under the Illinois Educational Labor Relations Act.

89. Defendant Robert Holton sat in on numerous hearings as the union representative and did nothing when obvious violations of plaintiff's rights were being committed.

90. Defendant Barbara Hillman delayed the processing of the grievance to a point that Dr. Harker could no longer file an unfair labor practice charge under the provisions of the Illinois Educational Labor Relations Act. She also withheld information from the arbitrator that she knew would support Harker's allegation that none of the charges leveled against him were true. She did this after clearly stating to Harker that she would make this information know in the arbitration process.

91. Defendant Thomas Layzell would not act to do anything to prevent Harker from being terminated although he was fully aware that none of the charges were valid and that the effort was the result of concerted effort by a group of individuals to deprive Harker of his constitutional rights of free speech and academic freedom.

92. Defendant Michael Provines conspired with Hillman, Dunn, Brewer, Stiffler and others to preclude Harker access to material which would exonerate Harker of each and every charge. Provines entered into an arrangement with Brewer that precluded Harker from having a fair hearing on the WIU campus and ultimately would preclude even having a level II hearing or a fair arbitration hearing.

93. The above named defendants caused Dr. Harker to be deprived of his employ with Western Illinois University by intentionally interfering with his employment relationship.

94. Wherefore, Plaintiff, George R. Harker, requests the following relief:

a)That he be awarded compensatory damages for all losses incurred, including but not limited to, lost wages and benefits, medical insurance, pension benefits, and any other benefits arising out of his employment, damages for pain, suffering, loss of reputation, humiliation, embarrassment, loss of professional career opportunities, and other career-related damages.

b) That Plaintiff be awarded punitive damages in an appropriate amount.

c) That plaintiff be awarded other and further relief as the Court deems just and appropriate.

PLAINTIFF, GEORGE R. HARKER, DEMANDS A TRIAL BY JURY ON COUNT II.

COUNT III

RETALIATORY DISCHARGE CLAIM AGAINST DEFENDANTS, UNIVERSITY PROFESSIONALS OF ILLINOIS, Ralph Wagoner, Donald S. Spencer, Burton Witthuhn, Gordon Kirk, Eric Stiffler, Bernard N. DiGrino, Gilbert A. Belles, Charles Spencer, Mark Dunn, John Maguire, Mitchell Vogel, Maurine Magliocco, Richard Brewer, Robert Holton, Barbara Hillman, Thomas Layzell, and Michael Provines.

Plaintiff, George R. Harker, realleges paragraphs 25 through 93 of Counts I and II.

94. Defendants' actions have violated the public policies of State of Illinois and policies embodied in its criminal and civil statutes including, but not limited to the following statutes:

a. 720 ILCS 5-8-1, 8-2, 5/31-4, 5/32-3, 4.

b. 110 ILCS 605-8, 10 (c),

c. 50 ILCS 7/35-2

95. Defendants' actions were intentional, malicious and for the purpose of retaliating against Harker because of his actions as described herein.

96. Wherefore, Plaintiff, George R. Harker, requests the following relief:

a) That he be awarded compensatory damages for all losses incurred, including but not limited to, lost wages and benefits, medical insurance, pension benefits, and any other benefits arising out of his employment, damages for pain, suffering, loss of reputation, humiliation, embarrassment, loss of professional career opportunities, and other career-related damages.

b) That Plaintiff be awarded punitive damages in an

appropriate amount.

c) That Plaintiff be awarded other and further relief as the Court deems just and appropriate.

PLAINTIFF, GEORGE R. HARKER, DEMANDS A TRIAL BY JURY ON COUNT III.

George R. Harker, Plaintiff, pro se